IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1028

AZALEA DRIVE-IN THEATRE, INCORPORATED,
AND TWIN DRIVE-IN THEATRE, INC.,

Petitioners,

v.

EDWARD A. SARGOY, JOSEPH L. STEIN
AND BURTON H. HANFT, INDIVIDUALLY,
AND d/b/a SARGOY, STEIN & HANFT,
DAVID FALLICK,
PHILLIP KORNFELD,
PARAMOUNT PICTURES CORP.,
METRO-GOLDWYN-MAYER, INC.,
TWENTIETH CENTURY FOX FILM CORPORATION,
WARNER BROTHERS DISTRIBUTING CORPORATION,
BUENA VISTA DISTRIBUTION COMPANY, INC.,
UNITED ARTISTS CORPORATION,
UNIVERSAL FILM EXCHANGES, INC.,
COLUMBIA PICTURES INDUSTRIES, INC., and
AMERICAN INTERNATIONAL PICTURES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Azalea Drive-In Theatre, Inc. and Twin Drive-In Theatre, Inc., Virginia corporations, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, reversing final judgment on a verdict by a jury, trebled in the amount of $300,000.00, rendered in the United States District Court for the Eastern District of Virginia, Norfolk, Virginia.

OPINION BELOW

The Order of the United States Court of Appeals for the Fourth Circuit, denying petitioners' Petitioner For Rehearing, is printed in the Appendix to this Petition. App. la. The opinion of the Court of Appeals, reported at 540 F.2d 713 (1976), is printed in the Appendix to this Petition. App. 2a-11a.

JURISDICTION

The Order of the Court of Appeals denying petitioners' Petition For Rehearing was entered on October 22, 1976, and was filed in the Court of Appeals on November 3, 1976. App. la. The Judgment of the Court of Appeals was entered and filed on July 26, 1976. App. 2a-11a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the trial court was based on the Clayton Act, §4, 38 Stat. 731, 15 U.S.C. §15.

QUESTIONS PRESENTED

1. Whether the holding of the Court of Appeals undermines and constitutes a radical departure from the time-honored principles which have governed the application of the doctrine of collateral estoppel throughout the federal system for one hundred years?

2. Whether vital policy considerations preclude application of the doctrine of collateral estoppel in the instant case?

3. Whether litigants are precluded from relying on the doctrine of collateral estoppel, to their benefit, where they have taken inconsistent positions in the related litigation?

4. Whether a finding that petitioners are barred by the doctrine of collateral estoppel deprives petitioners of their Seventh Amendment right to trial by jury on their federal antitrust claim?

5. Whether the Court of Appeals has crippled the private antitrust suit as a device for enforcement of the antitrust laws?

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment VII, provides (in pertinent part):

> "...[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law"

STATUTES INVOLVED

Section 4 of the Clayton Act, c. 323, 38 Stat. 731, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Parties

The Petitioners, *Azalea Drive-In Theatre, Inc.*, and *Twin Drive-In Theatre, Inc.*, (hereinafter collectively "Azalea") own and operate motion picture drive-in theatres at two locations in the Tidewater area of Virginia. In the industry, they are known as "exhibitors."

Respondents, *Paramount Pictures Corp., Metro-Goldwyn-Mayer, Inc., Twentieth Century Fox Film Corporation, Warner Bros. Distributing Corporation, Buena Vista Distribution Company, Inc., United Artists Corporation, Universal Film Exchanges, Inc., Columbia Pictures Industries, Inc.*, and *American International Pictures, Inc.* (hereinafter collectively "the distributors"), distribute motion pictures throughout the United States. These nine distributors control approximately 75% of the film distribution in the entire industry (TR. 64) and supply the motion pictures essential to the existence of Azalea. They

are known as "Majors" because of their obvious preeminence in motion picture distribution. Collectively, they earn approximately$400,000,000 per year in theatrical receipts (TR. 156). Motion pictures are provided by these distributors to small local exhibitors, such as Azalea, under rental or lease agreements whereby each exhibitor pays an agreed percentage of gross admission receipts to the distributor as rent for each motion picture.

Respondent, *Sargoy, Stein & Hanft* (hereinafter "Sargoy"), is a law firm in New York City. It is unique, and, in fact, the only law firm of its kind in the country (TR. 78). For twenty-five years, Sargoy has not represented any clients other than the eleven major distributors in the motion picture industry, including the nine in this action (TR. 64-5). Rather than provide traditional legal services, the bulk of Sargoy's representation is concerned with policing exhibitors on a nationwide basis, discovering and pursuing alleged claims of inaccurate reporting of gross receipts and collecting additional amounts of film rental alleged to be due distributors. Of the 55 people employed by the firm, only two are attorneys.

The nine respondent distributors, together with two other major distributors, have combined and associated together to maintain the Sargoy firm as a central office and clearinghouse, in order to exert their combined strength upon individual exhibitors, such as Azalea. By doing so, the respondents compel individual exhibitors to pay higher film rental prices (TR. 213). Sargoy's total annual legal fees are paid in proportionate shares by each of the major distributors, each such share being approximately equal to each distributor's percentage of the total annual theatrical receipts in the United States. Also, each distributor is likewise assessed a proportionate share of the total annual expenses of the Sargoy firm. All annual expenses and fees of the Sargoy firm are thus paid by this combination of the eleven largest distributors in the country (TR. 153-155).

In twenty-five years of doing business, Sargoy has never represented any of the distributors in a lawsuit, yet more than 100 lawsuits against exhibitors, initiated by Sargoy and the distributors, were pending at the time of the trial of this action

(TR. 72, 86, 560). Sargoy audits approximately 150 to 175 exhibitors per year and estimated that over One Million Dollars per year was found by the firm for their "clients" as alleged "underreporting" of the gross receipts. (TR. 145).

Respondents, *Phillip Kornfeld* and *David Fallick*, are accountants employed by the law firm of Sargoy, Stein & Hanft (TR. 92, 524-525) and actively represent the firm.

Respondent, *Burton H. Hanft*, is a partner of the firm of Sargoy, Stein & Hanft. He is the only partner actively engaged in the practice of law, at least to the extent that the firm engages in the practice of law (TR. 61).

The State Court Action

In 1971 Sargoy brought suit against Azalea in the Circuit Court of the City of Norfolk, Virginia, alleging that Azalea had defaulted on a promissory note payable to Sargoy. Sargoy claimed that the $70,000 note was given by Azalea in settlement of a claim for film rental, purportedly owed to the distributors because of alleged underreporting of gross receipts by Azalea over a period of years.[1]

On April 10, 1972, Azalea properly answered Sargoy's pleadings by asserting that the note was executed under duress, without lawful consideration, as a result of a threat by the distributors to unilaterally refuse to do business with Azalea if the note were not executed. The threat was verbally conveyed to Azalea's President by Sargoy's employee, respondent Phillip Kornfeld (TR. 266).

In addition, Azalea answered the State Court action by interposing an affirmative defense and counterclaim, alleging a combination and conspiracy in violation of the Sherman Act by Sargoy, the distributors and the other respondents in this action. The affirmative defense and counterclaim were both dismissed in the State Court, on motion of Sargoy, as

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[1] Respondents have admitted that their detailed and lengthy examination of Azalea's books and records (including bank records, ticket receipts and amusement tax returns) revealed no significant deficiencies or irregularities (TR. 126-127, 177, 181, 185). Azalea's president and accountant consistently denied any underreporting of gross receipts (TR. 195-196, 276-277).

not cognizable in the State forum, and all antitrust issues were expressly excluded from consideration by the State Court.

The State Court action was tried on September 24 and 25, 1973, without a jury, over Azalea's objections, (because the disputed instrument contained a jury waiver). The Court did not consider any evidence of issues under the antitrust laws of the United States and rendered a decision in favor of Sargoy on January 4, 1974, for the amount of the note, fees and costs. It is clear from the letter opinion, of the State Court Judge, however, that the Court never considered or ruled on the specific question of whether or not the distributors and Sargoy had actually threatened a group boycott or refusal to deal with Azalea. Instead, the Court simply considered whether there was "sufficient and convincing evidence of duress on the part of the plaintiffs [Sargoy]", and resolved the issue of common law duress in favor of Sargoy. (Letter opinion of Edward L. Ryan, Jr., Judge, dated January 4, 1974.)

Final judgment on the note in the State Court was affirmed by the Supreme Court of Virginia on April 28, 1975. *Azalea Drive-In Theatre* v. *Sargoy*, 215 Va. 714, 214 S.E. 2d 131 (1975). App. *28a-35a.* The Supreme Court of Virginia, likewise, did not consider the question of whether or not a threat had been made. *Id.* It also affirmed the State Court's holding that Azalea could not assert antitrust violations by Sargoy and the distributors as a defense, and that Azalea's antitrust counterclaim was not cognizable in a Virginia State Court. *Id.*

The Federal Antitrust Action

On August 30, 1973, Azalea filed the Complaint in the present action in the United States District Court for the Eastern District of Virginia. The Complaint charged, *inter alia,* that the distributors and Sargoy, together with the individual respondents Hanft, Kornfeld and Fallick, violated Section 1 of the Sherman Act by combining and conspiring and threatening Azalea with a group boycott and concerted refusal to deal, unless a note for $70,000 was executed by Azalea. The Complaint sought money damages as well as injunctive relief to enjoin Sargoy's pending and then undetermined State Court

action to collect the $70,000.00 disputed note from Azalea.

On September 12, 1973, the District Court held that the State Court action should not be enjoined and an Order to this effect was entered on September 17, 1973. In so holding, the District Court relied upon the argument set forth in respondent's written memorandum, as quoted below, that the State Court action could not and would not prejudice Azalea's independent right to maintain an antitrust action in the District Court:

> ". . . . [T]here is surely nothing in the Norfolk action which could prevent the plaintiffs from bringing this action if it is otherwise maintainable. . . . .[T]he effect of Judge Ryan's Order was to eliminate the federal antitrust issue as the basis for the counterclaim or as an affirmative defense to enforcement of the note. . . .
>
> ". . . . [T]he effect of Judge Ryan's ruling is that even if the note were obtained in violation of the antitrust laws, that does not constitute a defense to enforcement of the note but must be the subject of an independent action. . ." *Defendants' Memorandum in Opposition to Preliminary Injunction,* pp. 4-5, 7, as filed on September 12, 1973.

On February 14, 1975, after the trial in the State Court, Azalea filed another Motion for temporary injunctive relief, this time seeking to enjoin enforcement of the State Court judgment. Relief was again denied by the District Court in an Order dated April 4, 1974. App. 26a-27a. Once again, the District Court was urged by the distributors and the other defendants in their written argument:

> "There is no way that the enforcement of the state court judgment can endanger the federal antitrust rights of the exhibitor [Azalea] before the federal court." Letter to the Honorable John A. MacKenzie, dated April 2, 1974, p. 5.

Thereafter, this action was tried before the Honorable Richard B. Kellam and a jury on September 23, 24 and 25, 1974. The jury found that respondents did, in fact, combine and conspire in violation of Section 1 of the Sherman Act, and a verdict was returned for Azalea in the amount of $100,000.00 for actual damages. On September 25, 1974, a Judgment Order was entered, providing for $300,000.00 in treble damages.

Despite repeated representations and assurances to the District Court, that the State Court action could not and would not affect Azalea's antitrust rights in the Federal forum, respondents later ignored those previous representations and changed their position. After the jury verdict against them, respondents urged the District Court to dismiss the federal antitrust action, contending that the State Court decision had the effect of ousting the District Court of jurisdiction and estopping Azalea from proceeding on their antitrust claims. The District Court overruled such Motions.

Respondents' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, was denied and a second judgment was entered on February 28, 1975. The second Judgment Order was supported by a Memorandum Opinion, in which Judge Kellam fully discussed the various issues raised by respondents. App. *12a-23a.* In particular, Judge Kellam considered the record of Sargoy's State Court action and concluded:

> "Our review of the state court pleadings, record and Opinion, does not establish whether Judge Ryan found that a threat [to boycott Azalea] was or was not made. Accordingly, the doctrine of collateral estoppel in no way precludes litigating that fact in this action since *it is clear that Judge Ryan could have decided that the note was not executed under duress whether or not he found that a threat was made.*" App. *20a.* (Italics added)

In the Appelate Court below, oral argument was heard before Chief Judge C. F. Haynsworth, Jr., and Judges J. Braxton Craven, Jr. and John D. Butzner, Jr., on December 4,

1975. This case was decided on July 26, 1976, and a five page majority opinion was filed by Chief Judge Haynsworth with Judge Craven joining. App. *2a-5a.* An eight page dissenting opinion was simultaneously filed by Judge Butzner. App. *6a.-11a.* Thereafter Azalea filed a Petition for Rehearing and by Order of the Court of Appeals dated October 22, 1976 and filed November 3, 1976 the Petition for Rehearing was denied. App. *1a.*

ARGUMENT

I. THE HOLDING OF THE COURT OF APPEALS BELOW, UNDERMINES AND CONSTITUTES A RADICAL DEPARTURE FROM THE TIME-HONORED PRINCIPLES WHICH HAVE GOVERNED THE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL THROUGHOUT THE FEDERAL SYSTEM FOR ONE HUNDRED YEARS.

The salient facts may be simplified and are not in dispute. Sargoy filed an action against Azalea on a promissory note. Azalea interposed the defense of common law duress under applicable Virginia law. The trial Judge in the Circuit Court of Norfolk framed the issue in a letter opinion asking:

> "2. Was there sufficient and convincing evidence of duress on the part of the plaintiffs [Sargoy] to the detriment of the defendants [Azalea]?"

Without giving any indication whatsoever as to the basis of his decision or as to what was actually determined by him, the trial judge resolved this issue in his letter opinion stating:

> ". . . .it seems that to a broad degree the issues of law outlined above turn on issues of fact. As the trier of the facts, the Court decides same in favor of the plaintiffs [Sargoy]."

While the State Court proceeding was pending, Azalea filed the instant antitrust action in the United States District Court. Azalea alleged that the note was procured by threat of group boycott by the distributors, a *per se* violation of the antitrust laws. The jury resolved all the issues of fact in favor of Azalea, including necessarily the issue as to whether or not such a threat was made. Respondents urged the District Court Judge to set aside the verdict on the basis that the entire antitrust claim was barred by the doctrine of collateral estoppel. In short, that the trial Judge in the State Court had decided no threat had been made. After careful analysis, the District Court Judge could find no evidence on which to base such a conclusion. In his opinion, he sets out the applicable law, stating:

> "Thus, collateral estoppel does not bar inquiry into issues which might have been litigated in the prior suit, but were not; nor does it apply to any matter which, albeit litigated, was not essential to the judgment rendered in the prior adjudication. [Citations omitted], App. 16a.

The majority opinion of the Court of Appeals provides no basis whatsoever for their decision to reverse. The naked statement by the Court of Appeals that "[w]hen the state trial Judge stated that he found the facts in the plaintiffs' favor, he must have found that no threat had been made," (App. 5a), is not supported by the evidence. What "he must have found" is mere conjecture and to so hold flies in the face of time-honored principles which have governed the application of the doctrine of collateral estoppel throughout the Federal Court System for one hundred years.

In *Russell* v. *Place*, 94 U.S. 606 (1877), this Court set down the guidelines to be followed throughout the Federal System when confronted with the application of the doctrine of collateral estoppel to a factual situation similar to that presented in the instant case. It has long been established that collateral estoppel does *not* apply if it appears from the first action that:

> "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating, which of them was thus litigated, and upon which the judgment was rendered. . . ." Id. at 608

The law has been more particularly stated by Professor Moore in his treatise as follows:

> "If. . . .the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering Court." 1 B Moore's Federal Practice, ¶ 0.443 [4] at 3915.

Turning again to the State Court action we find that in order to establish the defense of duress under Virginia law, Azalea was required to prove by "sufficient and convincing" evidence that (1) Sargoy threatened a group boycott, (2) that the threat was unlawful under state law, and (3) that the threat was sufficient to overcome the will of a person of ordinary firmness. *See United States* v. *Huckabee*, 83 U.S. (16 Wall.) 414, 431-32 (1873); *Bond* v. *Crawford*, 193 Va. 437, 69 S.E. 2d 470, 475 (1952); *Ford* v. *Engleman*, 118 Va. 89, 96-97, 86 S.E. 852, 855 (1915) (dictum). Azalea's failure to prove any one of the foregoing elements by sufficient and convincing evidence before the state tribunal would have resulted in a verdict for the plaintiffs (Sargoy).[2]

In considering the common law of duress in conjunction with the State Trial Judge's letter opinion, the District Court Judge set forth his analysis in his Memorandum Decision, App. 19a, as follows:

> "There are, however, at least three ways in which Judge Ryan could have 'resolved the facts' in order to reach the ultimate finding of no duress. First he could have found

[2] Azalea's only argument that the threat was illegal was based on the theory that the threat constituted a violation of antitrust law. Azalea's position on this point was effectively undermined by the State Court's dismissal of all antitrust issues from the case.

no threat was made. Second, he might have found that a lawful threat was made. A third, yet equally plausible finding could have been that an unlawful threat was made but did not deny the victim the exercise of his free will. *Thus, it is impossible to infer from Judge Ryan's ultimate finding of no duress only one set of facts necessary to that determination."* (Italics ours)

In his well reasoned and carefully prepared dissent, Judge Butzner analyzed the law of duress as it relates to the State Court's letter opinion and stated that:

"[S]o far as this record reveals, the State Court could have found that [Sargoy] did not make any threat. But the State Court also could have believed that [Sargoy] threatened a group boycott and that this type of threat was not unlawful under state law. Or the State Court could have found that [Sargoy's] threat, though unlawful, did not overcome the will of Azalea's officers."

* * *

"The State Court's judgment and the State Judge's letter opinion, however, do not disclose on which of these three elements the judgment rests." App. 7a-8a.

Borrowing from this Court's language in *Russell* v. *Place, Supra,* it would seem clear that in the instant case, there were "several distinct matters (which) may have been litigated, upon one or more of which the judgment may have passed, (and there is no indication as to) which of them was thus litigated and upon which the judgment was rendered." 94 U.S. at 601.

The Federal Antitrust claim and the State Court proceedings are separate and distinct actions involving different elements and a different burden of proof. A group boycott is a *per se* violation of the Antitrust laws. *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212 (1959); *United States* v. *First National Pictures,* 282 U.S. 44, 54-55 (1930). Azalea, in the Federal action, was required to show only by a

preponderance of the evidence that the threat had been made. *See Ramsey* v. *United Mine Workers,* 401 U.S. 302, 307-11 (1971). Azalea was not required to prove such a threat by "sufficient and convincing" evidence as was required in the State Court proceeding. There is no requirement in the Antitrust action that Azalea prove that the threat was a violation of State law or that it was sufficient to overcome the will of a person of ordinary firmness. As the State Court judgment could have been decided on Azalea's failure to prove either of these elements, not required in Antitrust actions, the principle of *Russell* v. *Place, supra,* renders the doctrine of collateral estoppel inapplicable.

The majority opinion of the Fourth Circuit constitutes a radical departure from the established principles set down by this Court. The holding in the instant case has set a precedent which authorizes Courts to speculate as to what may have transpired in a prior proceeding without any evidence in support of the same. This decision has effectively undermined a valid Antitrust claim and will, no doubt, prove to be a constant source of confusion in every type of action where related proceedings have transpired.

It is, therefore, respectfully submitted that the careful analysis of Judge Butzner presents the correct application of the law to the instant case and that the same should be adopted and the majority opinion reversed.

II. VITAL POLICY CONSIDERATIONS PRECLUDE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL IN THE INSTANT CASE

Application of the Doctrine of Collateral Estoppel in the instant case has effectively ousted the United States District Court of the exclusive jurisdiction granted by Congress over antitrust actions.

Azalea initially sought to enforce its rights under the federal antitrust laws in the State Court proceeding, only to be advised that relief would have to be sought in the federal courts. Such relief was sought by Azalea – a compelling case was presented and a substantial jury verdict was returned. Now, however, the

Circuit Court's majority holding operates to deny Azalea the right to pursue its federal antitrust claim anywhere in the federal court system.

Treble damage actions under §4 of the Clayton Act, "supplement government enforcement of the antitrust laws." *United States* v. *Borden & Co.*, 347 U.S. 514, 518 (1954); *Osborn* v. *Sinclair Refining Co.*, 342 F.2d 566, 572 (4th Cir. 1973). The very reason for granting a treble damage claim to injured persons is "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore make them more effective." *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F.2d 891, 892 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955). Thus, in enacting the Sherman and Clayton Acts, Congress expressly voiced a strong policy in favor of vigorously preserving the unfettered freedom of the federal courts to entertain private antitrust litigation.

Judge Learned Hand, in his opinion in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F.2d 184 (1959), considered a claim that state court litigation might provide a subsequent bar to federal antitrust litigation, and reasoned as follows:

> "In the case at bar, it appears to us that the grant to the district courts of an exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; . . .The remedy provided is not solely civil; two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose . . . .There are sound reasons for assuming that such recovery should not be subject to determinations of state courts. It [the Clayton Act] was part of the effort [by Congress] to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being national in scope." 222 F.2d at 189.

Thus, Judge Hand clearly recognized the strong policy requiring unhampered antitrust jurisdiction in the federal courts. Moreover, Judge Hand carefully considered the history of the doctrine of res judicata and collateral estoppel, and reasoned as follows:

> "We are in accord with what Judge Goodrich says about the doctrine of res judicata in general. . . .'Such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day in court.' In short, it appears to us that the doctrine like so many others in the law, must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs." *Id.*

The same policy considerations that were present in *Lyons, supra*, are also present in the instant case.

Then, too, there are the important policy considerations considered in Judge Butzner's carefully-reasoned dissent in the instant case, with regard to separate standards of proof:

> "In the state court, Azalea had the burden of proving by clear and convincing evidence the three elements of duress . . . . [Citations omitted] The state court could have believed that Azalea's evidence of threat did not satisfy this stringent standard of proof. In contrast, in federal court Azalea had to prove by no more than a preponderance that Kornfeld had threatened a boycott. See *Ramsey* v. *United Mine Workers*, 401 U.S. 301, 307-11 (1971). Therefore, on the single element common to both cases, namely, the existence of Kornfeld's threat, the difference in the burden of proof between state and federal actions militates against holding that Azalea was collaterally estopped from asserting its antitrust claim. *Cf. Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938)." App. *9a.*

In light of all the foregoing, Azalea submits that this Court should consider and review this matter. Azalea has been deprived of a substantial jury verdict and award, not because of any defect or difficulty in the merits of the case, but because the majority in the Circuit Court below strained to interpret the admittedly vague holdings in a prior state court action so as to oust the appropriate federal district court of jurisdiction.

The questions raised in this case cry out for more thorough treatment.

Indeed, the ultimate holding in this case will have a tremendous effect upon the distribution of motion pictures, throughout the entire nation. More than 100 individual motion picture exhibitors are involved in similar lawsuits with these same respondents every year (TR. 72, 86, 560). As long ago as 1955, the United States Court of Appeals for the Second Circuit recognized that more than half of the Sargoy inspired suits resulted in antitrust defenses and counterclaims, interposed by the "targeted" exhibitors. *Laskey Bros.* v. *Warner Bros. Pictures*, 224 F.2d 824, 829 (2d Cir. 1955). The instant case is hardly an isolated example. Azalea has established and proven flagrant antitrust violations by respondents which continue to exist, even to this very day.

Most important, the validity and extent of the jurisdiction of the United States District Courts, when considering exclusively federal antitrust claims during the pendency of collateral state court proceedings, is very much at issue here. The effect of the Circuit Court's majority holding is that factual questions concerning federal antitrust claims may be determined in collateral state court proceedings where legal and proper claims under the federal antitrust laws may not otherwise be asserted or considered. The Circuit Court's holding, if allowed to stand, will have a far-reaching effect and will, in all likelihood, substantially compromise the right of many private plaintiffs to pursue entirely proper and lawful federal antitrust actions.

III. LITIGANTS ARE PRECLUDED FROM RELYING ON THE DOCTRINE OF COLLATERAL ESTOPPEL, TO THEIR BENEFIT, WHERE THEY HAVE TAKEN INCONSISTENT POSITIONS IN THE RELATED LITIGATION.

Subsequent to the filing of the State Court action and the Federal antitrust Complaint, Azalea moved the Federal District Court to enjoin the pending State Court action until the federal antitrust case could be litigated. In opposition to Azalea's motion, distributors *earnestly* argued to the District Court

Judge on numerous occasions, both orally and in written briefs, that the Federal and State Court actions were separate and distinct; that Azalea did not need an injunction to protect their rights; and, that nothing which might transpire in the State Court proceeding would later serve as a bar to the Federal antitrust action.

Once they obtained their judgment and all State Court proceedings were resolved in their favor, distributors then assumed the opposite position and urged the Federal Court that an estoppel had arisen as a result of the State Court proceeding.

On September 12, 1973, distributors, in their *Memorandum of Authorities in Opposition to Preliminary Injunction*, for the first time, *assured* the Federal District Court Judge that Azalea did not need an injunction to stay the State Court proceedings as:

> ". . . .there is surely nothing in the Norfolk action which would prevent the plaintiffs from bringing this action if it is otherwise maintainable. . . ." *(Defendants' Memorandum in Opposition to Preliminary Injunction*, p. 7, as filed on September 12, 1973.)

In further support of their position, distributors argued that the two proceedings were completely independent of each other and that no matter what might be decided in the State Court proceeding, Azalea was still entitled to proceed in the Federal Court on the basis of an antitrust violation:

> "The effect of Judge Ryan's order was to *eliminate* the Federal antitrust issue as the basis for the counterclaim or as an affirmative defense to enforcement of the note. . . ." *(Defendants' Memorandum in Opposition to Preliminary Injunction*, p. 4, as filed on September 12, 1973.) (Italics ours)

> "The effect of Judge Ryan's ruling is that even if the note were obtained in violation of the antitrust laws that does not constitute a defense to enforcement of

the note *but must be the subject of an independent action. . . .*" *(Defendants' Memorandum in Opposition to Preliminary Injunction,* p. 5, as filed on September 12, 1973.) (Italics ours)

Finally, in their Memorandum and oral argument, distributors urged that:

> ". . .enjoining the Norfolk action is not necessary to protect or effectuate any judgment this Court might enter." *(Defendants' Memorandum in Opposition to Preliminary Injunction,* p. 7, as filed on September 12, 1973.)

Based on distributors' representation of the law and facts, the Honorable District Court Judge overruled from the bench Azalea's Motion for an injunction to stay the State Court proceedings.

After distributors obtained a judgment in the State Court, Azalea again requested the District Court to enjoin them from proceeding further in the State Court. And, again, distributors took the same position that the two actions were independent and distinct and that nothing in the State Court proceedings would in any way prevent Azalea from proceeding in the Federal Court. In a letter dated April 2, 1974, to the Honorable John A. MacKenzie, distributors reiterated their position:

> "There is no way that the enforcement of the state court judgment can endanger the federal antitrust rights of the exhibitor before the federal court." (Letter to the Honorable John A. MacKenzie, dated April 2, 1974, p. 5.)

Accordingly, the Federal District Court Judge, by Order of April 4, 1974, denied the application of Azalea for an injunction, relying, certainly in part, on distributors' position that the actions are separate and independent.

In the Court's Order, the District Judge stated:

> "If anything, that case [referring to *Lyon, et al.* v. *Westinghouse Elec. Corp., et al.,* 2 F.2d 510 (2nd Cir. 1953)] would appear to support the proposition that the State case in which anti-trust violations were sought to be interposed as a defense (as here) and the Federal antitrust suit (as here) should proceed independently of each other." App. 26a.

The law in Virginia is well settled that parties are forbidden to "blow hot and cold" and to "play fast and loose" with the Court. This time-honored rule regarding parties who assume inconsistent positions in the course of litigation has been summarized by the Virginia Supreme Court in *Burch* v. *Grace St. Bldg. Corp.,* 168 Va. 329, 341, 191 S.E. 672, 677 (1937), wherein the Court stated:

> "[A] party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory." *Id.* See also, *C & O RR Co.* v. *Rison,* 99 Va. 31, 37; *Nagle* v. *Syer,* 150 Va. 508, 143 S.E. 690 (1928); *Rohanna* v. *Vazzana,* 196 Va. 549, 84 S.E.2d 440 (1954); *Leech* v. *Beazley,* 203 Va. 955, 128 S.E.2d 293 (1962).

The long-standing Virginia rule, providing that the litigants are estopped from assuming inconsistent positions, is applicable to the case at bar. The necessity for the rule is obvious:

> "If the parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law available only between those who consented to its exercise would be set at naught by all." *Burch, supra,* at p. 341.

It is respectfully submitted that distributors should not be allowed to approbate and reprobate. They should not be permitted to ask the Federal District Judge to adopt one position, and as soon as they have obtained the desired result, come back to the Federal District Judge and ask him to take the opposite position. The law is unequivocally clear, distributors cannot play "fast and loose" with the Court. In view of the foregoing, it is respectfully submitted that distributors are now barred from taking the position that an estoppel has arisen as a result of the State Court proceedings.

IV. A FINDING THAT PETITIONERS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL DEPRIVES PETITIONERS OF THEIR SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY ON THEIR FEDERAL ANTITRUST CLAIM.

The majority decision of the Court of Appeals, that petitioners' federal antitrust claim is barred by the doctrine of collateral estoppel as a result of the State Court's decision in *Azalea Drive-In Theatre* v. *Sargoy*, 215 Va. 714, 214 S.E.2d 131 (1975), App. 28a-35a, effectively serves to deny petitioners of their Seventh Amendment right to a jury trial on their claim of federal antitrust violations.

In upholding the State Court's denial of Azalea's request for a jury trial of the factual issues presented therein, the Supreme Court of Virginia concluded:

> "Since the provision in the note waived a jury trial, and we have held that in the present case the alleged violation of the federal antitrust laws is not a viable affirmative defense to this action on the note, we hold that the trial court did not err in denying the defendants' motion for a trial by jury." 214 S.E.2d at 136, App. 34a.

Thus Azalea was denied the opportunity to present, for a jury's determination, their evidence that Sargoy and the distributors had threatened a group boycott or a concerted refusal

to provide films to Azalea as a defense to the execution of the note.

In the United States District Court, however, Azalea requested and received a trial by jury, and the jury, accordingly, found that the evidence presented was sufficient to establish an antitrust violation on the part of Sargoy and the distributors, and returned a verdict in favor of Azalea. In the Court of Appeals, Judge Butzner, in a well-reasoned and documented dissenting opinion, concluded that a jury trial on the factual issues presented by petitioners' antitrust claim was particularly appropriate in view of the conflicts in the evidence.[3]

The majority opinion of the Court of Appeals, however, by applying the doctrine of collateral estoppel, has effectively stripped Azalea of the right to a trial by jury on the essential elements of its antitrust claim.

It is submitted that the propriety of adopting the State Court's finding of fact, made without a jury, to estop Azalea from asserting its claim of federal antitrust violations must be considered in view of the State Court's ruling that alleged violations of the federal antitrust laws do not present a viable affirmative defense to the note entitling Azalea to a jury.

If the Court of Appeals decision is upheld, Azalea will be deprived of its right to a trial by jury of the factual issues raised by its antitrust claim in the instant case, and when

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[3] "A jury trial was particularly appropriate for the resolution of the federal antitrust claim because, although the law is clear, the factual issues presented a sharp conflict. Kornfeld denied threatening a group boycott. The distributors' theory of the case was that Azalea executed the promissory note because it realized it had been caught cheating on its exhibitor's fee. Even though the distributors' auditors could not find a discrepancy in Azalea's books, they insisted that Azalea was understating its admissions. Without going into detail about the auditors' computations, it is worth noting that proof of the underpayments depended on the reliability and accuracy of persons the distributors' lawyer employed to check the number of cars at the drive-in theatre.

Azalea denied any under payment and contended that it executed the promissory note solely because of Kornfeld's threatened group boycott. In support of its position that it had paid all the fees that were due, Azalea introduced evidence that the checkers were unreliable. It cited examples of one who consistently arrived well after the movie had begun and of another who had to be removed because he was intoxicated. Some spent most of their time loitering near the concession stand instead of checking the gates.

It is therefore apparent that the reliability and accuracy of the checkers was a vital issue in the case." J. Butzner, dissenting opinion, App. 10a.

viewed in light of the State Court's decision, the ruling of the Court of Appeals will preclude Azalea and all other persons similarly situated from pursuing valid federal antitrust claims with the attendant right to a trial by jury, whenever the fruits of wrongful federal antitrust violations are evidenced by promissory notes or other instruments containing jury waiver clauses.

V. THE COURT OF APPEALS HAS CRIPPLED THE PRIVATE ANTITRUST SUIT AS A DEVICE FOR ENFORCEMENT OF THE ANTITRUST LAWS.

A reversal of the court below is required in this case in the interests of antitrust enforcement and of lightening the court's burden in that respect. The bulk of antitrust cases coming to the Court are brought by the Department of Justice and come by way of direct appeal under the Expediting Act, 15 U.S.C. § 29. This mode of access to the Court has serious disadvantages. The Court has no discretion in taking the case and must forego the advantage of an intermediate appeal which would sift the important issues from the usually gargantuan record. Moreover, since civil cases brought by the United States are tried to a judge, there is a marked tendency towards *per se* rulings with correlative loss of the flexibility inherent in jury dispositions. The number of such government-brought cases will tend to be limited to the extent that the antitrust laws can be vigorously enforced through private antitrust actions.

Similar observations were made by Mr. Lee Loevinger, former head of the Antitrust Division of the Department of Justice. In an article written while head of the Antitrust Division he concluded that, between governmental and private antitrust enforcement, the private antitrust action "is both more desirable and more effective." Loevinger, "Private Action – The Strongest Pillar of Antitrust," *Hoffmann's Antitrust Law and Techniques,* Vol. 1, p. 374 (1963). His position is based on the fact that (1) the private party is more aware of the existence and effect of antitrust violations within his own industry, (2) private law enforcement is both "more flexible and less authoritarian," (3) the private action grants repair

for past economic injury to competitors, and (4) the triple damage recovery is a more effective deterrent than the prospect of a fine or injunction by government action. He concludes that "even a quadruple appropriation for the Antitrust Division would not equal the enforcement effectiveness of private action." Ibid.

The efficacy of the private antitrust action, however, depends upon a sympathetic hearing in the federal courts. This Court has previously noted the congressional intent to place the private antitrust litigant in a favorable position, *Radovich* v. *National Football League,* 352 U.S. 445, 454; but as Mr. Loevinger observes:

> Nevertheless, many courts have an attitude of definite hostility to private antitrust suits; and the decisions are stricter in their interpretation of the laws and more rigorous in their requirements of proof in private suits than in government actions under the antitrust laws. Loevinger, *supra,* p. 377.

The Fourth Circuit's majority holding in this case epitomizes this attitude of hostility. By its holding below, it has emasculated the private antitrust action within its jurisdiction. In particular, it has authorized free use of state courts, to enforce obligations incurred in violation of Federal law, while simultaneously throwing the victim out of court without fair consideration of his federal claim.

The importance of this case is accentuated by the failure of the Justice Department to take action against the respondents. For petitioners have lost not only their sole effective private remedy, but any expectation of public remedy. With petitioners' loss of hope goes the respondents' loss of fear to engage in further illegal activities.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

AZALEA DRIVE-IN THEATRE INCORPORATED and TWIN DRIVE-IN THEATRE, INC.

By STANLEY E. SACKS
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APPENDIX

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1504

Azalea Drive-In Theatre, Inc.,
and Twin Drive-In Theatre, Inc.,
Virginia Corporations,

Appellees,

versus

Burton H. Hanft, Individually, and
d/b/a Sargoy, Stein and Hanft (a
Partnership), formerly known as Sargoy
& Stein, Attorneys, David Fallick,
Individually, and Philip Kornfeld,
Individually, and Paramount Pictures
Corp., Metro-Goldwyn-Mayer, Inc.,
Twentieth Century Fox Film Corpora-
tion, Buena Vista Distribution Company,
Inc., United Artists Corporation,
Universal Film Exchanges, Inc.,
Columbia Pictures Industries, Inc.,
and American International Pictures,
Inc., Foreign Corporations,

O R D E R
(Filed November 3, 1976)

Upon consideration of the petition for rehearing, and a poll of the court having been made on the suggestion of rehearing *en banc* with less than a majority of the active judges voting for rehearing *en banc*,

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT

/s/ Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

October 22, 1976

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1504

Azalea Drive-In Theatre, Inc., and
Twin Drive-In Theatre, Inc.,
Virginia Corporations,

Appellees,

versus

Burton H. Hanft, Individually, and
d/b/a Sargoy, Stein and Hanft (a
Partnership), formerly known as Sargoy
& Stein, Attorneys, David Fallick,
Individually, and Philip Kornfeld,
Individually, and Paramount Pictures
Corp., Metro-Goldwyn-Mayer, Inc.,
Twentieth Century Fox Film Corpora-
tion, Buena Vista Distribution Company,
Inc., United Artists Corporation,
Universal Film Exchanges, Inc.,
Columbia Pictures Industries, Inc.,
and American International Pictures,
Inc., Foreign Corporations,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Argued December 4, 1975 Decided July 26, 1976

Before HAYNSWORTH, Chief Judge, CRAVEN and BUTZNER, Circuit Judges

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OPINION OF THE COURT
(Filed July 26, 1976)

HAYNSWORTH, Chief Judge:

In this civil antitrust action judgment was entered upon the verdict of a jury in favor of the plaintiffs of $100,000 actual damages, trebled under the provisions of 15 U.S.C.A. § 15 to $300,000. In entering the judgment, the district court declined to apply the doctrine of collateral estoppel to foreclose the claim, concluding that in the previous litigation in the state court the basic factual dispute had not been settled. We disagree and reverse.

The nine motion picture distributors, representing seventy-five per cent of the industry, leased moving pictures to theatres throughout the country under rental agreements providing for a payment of a percentage of the theatre's box office receipts to the distributor. The agreements authorized the distributor to make periodic inspections and to audit the books of the theatre in order to insure that the theatre is not underrepresenting box office receipts. The distributors employed the law firm of Sargoy, Stein and Hanft to conduct the required investigations.

Philip Kornfeld, an accountant employed by the Sargoy firm, undertook an investigation of the plaintiff Azalea Drive-In Theatre. He found that the reporting was consistent with the books maintained by Azalea, but he found other evidence from which the defendants estimated that there had been underdisclosure and underreporting by as much as $240,000. Azalea's representatives insisted the books were accurate. After extensive negotiations, representatives of Azalea executed and delivered a promissory note for $70,000 in settlement of the controversy.

The first payment due on the note was never made, and a suit was filed in a state court to recover on the instrument. Azalea answered setting forth three affirmative defenses, (1) that the note was given without consideration, (2) that it was executed and delivered by Azalea's president, Ernest Price, under duress, he allegedly having been threatened by Kornfeld with a group boycott, or that they would deal with him on less favorable terms than others if he did not, and, (3) the general

allegation that the note was obtained in violation of the antitrust laws of the United States, generally and specifically in violation of the Robinson-Patman Act. There was also a counterclaim setting forth the antitrust claims. The state court judge struck the third affirmative defense and the counterclaim upon the ground that enforcement of the antitrust laws was within the exclusive jurisdiction of the federal courts, and the case proceeded to trial before the judge without a jury.

At the trial Price testified that Kornfeld had threatened a group boycott. This was denied by Kornfeld who testified that he had had many such negotiations and had never employed any such tactic.

After the conclusion of the trial, the judge incorporated his findings and conclusions in a letter during which he stated one of the questions to be determined by him 2. Was there sufficient and convincing evidence of duress on the part of the plaintiffs to the detriment of the defendants." He included no detailed statement of his factual findings but stated "as the trier of the facts, the Court decides same in favor of the plaintiffs." He directed the preparation and presentation of an order granting judgment in favor of the plaintiffs for $70,000, the face of the note, plus interest and an attorney's fee for 25%.

Meanwhile, the plaintiffs here had filed this action in the district court charging a violation of the Clayton Act and the use of "monopolistic and economic threat, coercion and duress" in obtaining the $70,000 note. After the conclusion of state court litigation, the answer was amended to include an assertion that the doctrine of collateral estoppel foreclosed any relitigation of the matter of the alleged threat and resulting duress. Reserving his ruling on the matter until after the verdict, the court then ruled that the doctrine was inapplicable. Noting the absence of specific findings, he reasoned that the state court judge may have found that the threat was made but that it did not constitute duress.

As it developed, however, the factual dispute in the federal court was exactly the same as the factual dispute in the state court. Price testified that he had been threatened with a group boycott and executed the note for money he did not owe only under the force of the threat. The testimony for the defense was that no such threat was made. No one suggested that a threat was made but that it was made and understood to have been in jest or for some other reason did not restrict the exhibitor in the free exercise of his will. When the state trial judge stated that he found the facts in the plaintiffs' favor, he must have found that no threat had been made.

Under established principles of collateral estoppel, any issue of ultimate fact which was actually litigated and necessarily determined in a prior action cannot again be litigated between the same parties. *Yates v. United States*, 354 U.S. 298, 335-36 (1957); *United States v. Davis*, 460 F.2d 792, 795-96 (4th Cir. 1972). We conclude that the issue of threat *vel non* was litigated and decided in the state court proceedings and was not open to relitigation in the district court.

Nor are we persuaded that application of collateral estoppel here materially compromises Azalea's right to a trial by jury. With respect to the state court trial, that right was waived in the terms of the note, and the rules foreclosing relitigation of factual issues between the same parties serve such important policies that relitigation should not be allowed though the fact finding processes in the first tribunal were unlike those which otherwise would be available in the second.[1]

For these reasons we reverse the judgment in favor of the plaintiff theatres for damages under the antitrust laws measured by the amount of the valid state court judgment.

REVERSED.

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[1] In this connection, the factual question did not turn alone upon the credibility of the checkers sent to the theatre by the defendants. Their testimony was strongly corroborated by objective evidence obtained from the independent concessionaire. If Azalea's books were correct, the records of the concessionaire show that each patron of the theatre spent an extraordinarily large amount of money for refreshments.

BUTZNER, Circuit Judge, dissenting:

I would affirm the district judge's decision that the state court's judgment did not collaterally estop Azalea from litigating whether the motion picture distributors, acting through Philip Kornfeld, procured a $70,000 note from Azalea by threatening a group boycott.

The factual background of this controversy can be briefly stated. The fees Azalea Drive-In Theatre paid to distributors of movies depended on its gate receipts. Kornfeld, an employee of the law firm retained by the distributors, determined to his satisfaction that Azalea had underreported its receipts. He procured a $70,000 note, payable to his firm, from Azalea in satisfaction of the distributors' claims. When Azalea defaulted, the firm brought suit on the note in state court. Azalea defended on the grounds, among others, that the note had been obtained by duress and that it had been procured in violation of the federal antitrust laws. Both of these defenses were based on Azalea's claim that it had signed the note only because Kornfeld had threatened that, otherwise, no distributor would lease movies to Azalea. The state court struck the antitrust defense, holding that enforcement of the antitrust laws was within the exclusive jurisdiction of the federal courts. Without saying expressly why, the state court found against Azalea's state law duress claim.

In the meantime Azalea filed a federal action claiming damages for violation of the Sherman Act. The district court declined to hold Azalea estopped from relitigating the question whether Kornfeld threatened a group boycott. On appeal the majority reverses, holding that the state court judgment estops Azalea from proving the threat. My dissent is based on the following considerations.

I

The distributors rely on the principle that any issue of ultimate fact which was actually litigated and necessarily decided in a prior action cannot be relitigated by the same parties. This is all well and good, but it is only a part of the law of collateral estoppel. Equally important is the point made in Russell v. Place, 94 U.S. 606, 608 (1877), where the Court

emphasized that collateral estoppel does not apply if it appears that in the first action "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered. . . ."[1] This well settled principle bars the application of the doctrine of collateral estoppel here.

In order to prevail upon its plea of duress in the state court, Azalea was obliged to prove (1) that Kornfeld threatened a group boycott, (2) that the threat was unlawful under state law, and (3) that the threat was sufficient to overcome the will of a person of ordinary firmness. *See* United States v. Huckabee, 83 U.S. (16 Wall.) 414, 431-32 (1873); Bond v. Crawford, 193 Va. 437, 69 S.E.2d 470, 475 (1952); Ford v. Engleman, 118 Va. 89, 96-97, 86 S.E. 852, 855 (1915) (dictum). The state court's judgment and the state judge's letter opinion, however, do not disclose on which of these three elements the judgment rests.[2] So far as this record reveals, the

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[1] Professor Moore states the law as follows:

> "If. . .the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none ot them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering court." 1 B Moore's Federal Practice, ¶ 0.443 [4] at 3915.

See also Restatement of Judgments § 68, comment *l* (1942).

[2] The text of the state court's letter opinion reads as follows:

> "There is no need for the Court to state the facts, as these have been adequately stated in the comprehensive briefs filed by counsel for the parties. However, the following interesting points of law are raised by the pleadings and the evidence:
>
> 1. Was there sufficient consideration to support the contractual agreement?
> 2. Was there sufficient and convincing evidence of duress on the part of the plaintiffs to the detriment of the defendants?
> 3. Was there a binding contract between the parties?
> 4. Was there a counteroffer made by plaintiffs to defendants which has never been accepted by the defendant? Or was the agreement amended only to conform to the prior agreement of the parties?

state court could have found that Kornfeld did not make any threat. But the state court also could have believed that Kornfeld threatened a group boycott and that this type of threat was not unlawful under state law. Or the state court could have found that Kornfeld's threat, though unlawful, did not overcome the will of Azalea's officers.

A group boycott is a per se violation of the antitrust laws. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); United States v. First National Pictures, 282 U.S. 44, 54-55 (1930). Therefore, in its federal action Azalea was required to show only that the distributors, acting through Kornfeld, had threatened a group boycott and that there was a casual relationship between the threat and the harm that Azalea claimed to have suffered. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 566 (1931); Osborn v. Sinclair Refining Co., 324 F.2d 566, 571-72 (4th Cir. 1963).

In the federal action Azalea was not required to prove that Kornfeld's threat was a violation of state law or that it overcame the will of Azalea's officials. Since the state judgment could have rested on Azalea's failure to prove either of these elements of its plea of duress, under the previously mentioned principle of Russell v. Place, 94 U.S. 606, 608 (1877), the doctrine of collateral estoppel is inapplicable.

II

Quite apart from the reasons stated in Part I, important policy considerations buttress my conclusion that Azalea should not be estopped by the state court judgment. The first of these relates to differences in the burden of proof. In the state court Azalea had the burden of proving by clear and con-

"Counsel have cited to the Court an abundance of case law and other authorities. The Court concludes that the authorities cited by the plaintiff are more persuasive, considering the peculiar facts and circumstances of the case. In addition, it seems that to a broad degree the issues of law outlined above turn on issues of fact. As the trier of the facts, the Court decides same in favor of the plaintiffs.

"Counsel for plaintiffs may present for entry a sketch of an Order granting judgment to plaintiffs in the sum of $70,000.00, plus interest at the rate of 7 percent from February 12, 1971, plus an attorneys' fee of 25 percent, saving unto defendants their exceptions."

vincing evidence the three elements of duress mentioned in Part I. *See* Scott v. Scott, 142 Va. 31, 39-40, 128 S.E. 599, 601 (1925). The state court could have believed that Azalea's evidence of a threat did not satisfy this stringent standard of proof.[3]

In contrast, in federal court Azalea had to prove by no more than a preponderance of the evidence that Kornfeld had threatened a group boycott. *See* Ramsey v. United Mine Workers, 401 U.S. 302, 307-11 (1971). Therefore, on the single element common to both cases, namely, the existence of Kornfeld's threat, the difference in the burden of proof between state and federal actions militates against holding that Azalea was collaterally estopped from asserting its antitrust claim. *Cf.* Helvering v. Mitchell, 303 U.S. 391, 397 (1938).

III

The promissory note contained a clause waiving trial by jury. In the state court Azalea argued that the waiver should be disregarded because the note had been procured by the threat of a group boycott in violation of the federal antitrust laws and was invalid. The state trial court and the Supreme Court of Virginia rejected this argument. In Azalea Drive-In Theatre v. Sargoy, 215 Va. 714, 214 S.E.2d 131 (1975), the Court pointed out that Azalea's claim of a federal antitrust violation was collateral to the main issue in the motion for judgment on Azalea's note and that the claim was not a viable defense to the action on the note. It observed, however, that the principal case on which it relied, Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 756 (1947), did not preclude an independent action for the antitrust violation in a federal court. The Court concluded:

> "Since the provision in the note waived a jury trial, and we have held that in the present case the alleged violation of the federal antitrust laws is not a viable

[3] This point is illustrated by the state judge's concept of the issue raised by Azalea's defense of duress: "Was there *sufficient and convincing* evidence of duress on the part of [Kornfeld] to the detriment of [Azalea]?" [Italics added]

> affirmative defense to this action on the note, we hold that the trial court did not err in denying the defendants' motion for a trial by jury." 214 S.E.2d at 136.

In the federal court, Azalea exercised its right to a jury trial. The jury found in its favor.

A jury trial was particularly appropriate for the resolution of the federal antitrust claim because, although the law is clear, the factual issues present a sharp conflict. Kornfeld denied threatening a group boycott. The distributors' theory of the case was that Azalea executed the promissory note because it realized it had been caught cheating on its exhibitor's fees. Even though the distributors' auditors could not find a discrepancy in Azalea's books, they insisted that Azalea was understating its admissions. Without going into detail about the auditors' computation, it is worth noting that proof of the underpayments depended on the reliability and accuracy of persons the distributors' lawyer employed to check the number of cars at the drive-in theater.

Azalea denied any underpayment and contended that it executed the promissory note solely because of Kornfeld's threatened group boycott. In support of its position that it had paid all the fees that were due, Azalea introduced evidence that the checkers were unreliable. It cited examples of one who consistently arrived well after the movie had begun and of another who had to be removed because he was intoxicated. Some spent most of their time loitering near the concession stand instead of checking the gates.

It is therefore apparent that the reliability and accuracy of the checkers was a vital issue in the case. But the application of the doctrine of collateral estoppel has stripped Azalea of the right to a trail by jury on this and other essential issues of its antitrust claim. The propriety of using the state judge's finding of fact made without a jury to estop Azalea in federal court cannot be tested in a vacuum. It must be viewed in the light of the Virginia Supreme Court's ruling that a violation of the federal antitrust laws was not a viable affirmative defense to the note entitling Azalea to a jury. This synergy of state and federal appellate rulings compromises Azalea's seventh amendment right to trial by jury on its antitrust claim. *See generally* Note, Res Judicata: Exclusive Federal Jurisdiction and the

Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360, 1383-84 & n. 85 (1967).

The district judge carefully considered the legal and factual basis of the arguments for and against the application of the doctrine of collateral estoppel in this case. In a well reasoned opinion he concluded that Azalea was not estopped. I would affirm his ruling.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

AZALEA DRIVE-IN THEATRE, INC., and TWIN DRIVE-IN THEATRE, INC.,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 73-347-N
EDWARD A. SARGOY, ET AL,	)	
Defendants.	)	

MEMORANDUM DECISION
(Filed February 28, 1975)

Plaintiff corporations, which own and operate outdoor motion picture theatres in the Tidewater area of Virginia, instituted this action pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and 28 U.S.C. §§ 1331(a), 1332 and 1337,[1] alleging that the defendants, motion picture distributing corporations and their agents, had violated the federal antitrust laws by combining or conspiring to restrain interstate trade or commerce,[2] by monopolizing or attempting to monopolize such trade or commerce,[3] and by fixing prices.[4]

[1]While four jurisdictional bases are asserted, primary reliance is placed upon Section 4 of the Clayton Act, 15 U.S.C. § 15 which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2]Section 1 of the Sherman Act, 15 U.S.C. § 1 declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . ."

[3]Section 2 of the Sherman Act, 15 U.S.C. § 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . . shall be guilty of a misdemeanor . . . ."

[4]Provisions declaring price fixing illegal are codified as Section 1 of the Robinson-Patman Anti-discrimination Act, 15 U.S.C. § 13.

The case was tried to the jury on September 23, 24 and 25, 1974. Prior to the presentation of any evidence, this Court, finding that plaintiffs had failed to include price fixing in the final pretrial order as one of the triable issues, ruled that evidence of price fixing would be inadmissible (Transcript p. 19). After the presentation of all the evidence, plaintiffs' attorneys withdrew all proposed instructions concerning the issue of monopolization and the case was submitted to the jury solely on the issue of whether the defendants had combined or conspired in restraint of interstate trade or commerce. The jury returned a $100,000.00 verdict in favor of plaintiffs.

At the conclusion of plaintiff's case and again after all evidence had been presented, defendants moved for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The Court withheld ruling on said motions and the jury returned the aforesaid verdict adverse to defendants. They now move, pursuant to Rule 50(b), for judgment notwithstanding the verdict or, in the alternative, for a new trial.

The issues to be decided are: (1) whether the doctrine of collateral estoppel bars recovery in this action, and (2) assuming that doctrine to be inapplicable, whether the evidence is insufficient to support the verdict of the jury.[5] For the reasons set out below, we hold that the doctrine of collateral estoppel does not bar recovery and that the evidence is sufficient to support the jury verdict.

I

FACTUAL BACKGROUND

Plaintiff corporations exhibit motion pictures to the public. To obtain some of the films so exhibited, they entered into

[5]In addition to their primary contentions, defendants assert that the form of verdict was improper, and that this Court erred (1) in its charge to the jury, (2) in permitting the introduction of a deposition of a deceased witness taken in a prior state action, and (3) in refusing to grant their motions for a directed verdict. Taking these assertions singly or in combination, they do not constitute sufficient grounds for granting a new trial, nor do they require us to set aside the verdict and enter judgment n.o.v. in favor of defendants.

formal agreements with the nine defendant distribution corporations whereby the distributors agreed to lease film to the exhibitors in return for the exhibitors' promise to pay as rent a percentage of the gross admission receipts on each film exhibited. Pursuant to the leasing agreement, exhibitors authorized the distributors to audit their books to insure that the proper rent was being paid. For more than 25 years, the distributors have utilized the New York based law firm of Sargoy, Stein and Hanft for this purpose. If an audit discloses underreporting of admissions, the law firm is authorized to collect whatever rent is owed either through settlement or litigation.

In November, 1970, the law firm notified plaintiffs that their books would be audited. On December 14, Philip Kornfeld, an accountant employed by the law firm, travelled to Norfolk and commenced the audit. The audit lasted one week whereupon Kornfeld returned to his New York office to analyze the data collected.

Kornfeld subsequently returned to Norfolk on January 15, 1971, to discuss with plaintiffs the results of his investigation. He advised them that he had uncovered underreporting of admissions in excess of $240,000.00 for the five-year audit period. Plaintiffs denied any underreporting and Kornfeld returned to New York.

On February 12, 1971, Kornfeld returned to Norfolk to elicit an offer of settlement from plaintiffs. After extensive negotiations, plaintiffs executed a $70,000.00 promissory note in favor of the law firm, in full settlement of the claim for past due rent. Plaintiffs, however, defaulted when the first installment came due and the noteholder brought suit in the Court of Law and Chancery of the City of Norfolk (now Circuit Court of the City of Norfolk) to recover on the instrument.

In defending the state action, the exhibitors argued that the note was invalid (1) for lack of consideration, (2) because it was executed under duress, and (3) because it was obtained in violation of the federal antitrust laws. The exhibitors also raised the alleged antitrust violation to support a $210,000.00 counterclaim.

The noteholder filed a plea in abatement to the counterclaim and a motion to strike the antitrust defense. Judge Ryan, the presiding judge in the state court action, accepting the contention that the antitrust issues are exclusively within

the province of the federal courts, sustained both motions by order dated August 7, 1972. Preserved were the defenses of duress and failure of consideration.

While the state action was pending, the exhibitors filed their antitrust complaint in this Court and moved for a stay of the state proceedings pending resolution of the antitrust action. This motion was denied and on January 4, 1974, the state court judge ruled that the promissory note was enforceable. Shortly thereafter judgment was entered in favor of the noteholder.

In his opinion, Judge Ryan posed the legal issues before him, asking, *inter alia*, "Was there *sufficient and convincing evidence* of duress on the part of the plaintiffs [noteholders] to the detriment of the defendants [exhibitors]?" (Emphasis added).

In resolving this question, Judge Ryan stated:

> Counsel have cited to the Court an abundance of case law and other authorities. The Court concludes that the authorities cited by the plaintiff [noteholder] are more persuasive, considering the peculiar facts and circumstances of the case. In addition, it seems that to a broad degree the issues of law outlined above turn on issues of fact. As the trier of the facts, the Court decides same in favor of the plaintiffs.

In the case at bar, the defendant motion picture distributors argue that the finding of no duress in the prior state action bars relitigation of that issue in this Court under the doctrine of collateral estoppel.

II

COLLATERAL ESTOPPEL

Under the doctrine of res judicata, a final judgment on the merits in one suit bars a subsequent suit involving the same parties or their privies based on the same cause of action. Collateral estoppel, on the other hand, is more narrow. Generally speaking, collateral estoppel bars the same parties or their

privies[6] from contesting in a subsequent proceeding on a different cause of action any question or fact actually litigated and determined in the prior suit.[7]

A classic statement of the rule is found in *Southern Pac. R.R. Co.* v. *United States,* 168 U.S. 1, 48-49 (1897), wherein the Supreme Court stated:

> [A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established. . . ."[8]

While the doctrine of res judicata bars subsequent litigation on the same cause of action of all matters which were or might have been litigated in the first suit, collateral estoppel operates as a bar in a suit on a cause of action different from that forming the basis for the original suit "*only* as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell* v. *County of Sac,* 94 U.S. (4 Otto) 351, 353 (1876) (Emphasis added). Thus, collateral estoppel does not bar inquiry into issues which might have been litigated in the prior suit, but were not; nor does it apply to any matter which, albeit litigated, was not essential to the judgment rendered in the prior adjudication.

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[6]The plaintiffs and defendant law firm in this action were parties to the state action. There is no dispute that the additional named defendants, the nine motion picture distributing corporations and the two auditors, Kornfeld and Fallick, were privy to the state action.

[7]For a comprehensive discussion of the doctrine of collateral estoppel, see 1B Moore's Federal Practice ¶ 0.441 *et seq.*; *Restatement of Judgments* §§ 68 *et seq.*

[8]Accord Cromwell v. County of Sac, 94 U.S. (4 Otto) 351 (1876); Russell v. Place, 94 U.S. (4 Otto) 606 (1876); Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 671 (1944); Commissioner v. Sunnen, 333 U.S. 591, 597-99 (1948); United States v. Munsingwear, Inc., 340 U.S. 36, 38 (1950); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 101 (1954); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955); Ashe v. Swenson, 397 U.S. 436, 443 (1970).

It is well settled that the party seeking to invoke the doctrine of collateral estoppel must establish that in a prior suit – (1) the same issue (2) was actually litigated and judicially determined, and (3) that the determination made of the issue in the prior action was essential to the judgment there rendered. *See generally* 1B Moore's Federal Practice ¶ 0.443[1], [2], [3] and [4]; Restatement of Judgments § 68. If any one of these elements is lacking, the doctrine is inapplicable.

(a)

With this background, we turn to the question whether the state court's finding that the promissory note was not executed under duress precludes relitigation here of that issue and ultimately bars recovery in this action. It is clear from examination of the pleadings in the state action that the issue of duress was actually litigated.[9] Judge Ryan's opinion establishes that the issue was finally determined by a court of competent jurisdiction. Further, the finding of no duress clearly was necessary to the state judgment since, had duress been established, judgment would have been entered in favor of the maker of the note.

The finding of the state court that the note was not executed under duress is clear, and the doctrine of collateral estoppel would bar relitigation of that issue in this action.[10] We find, however, that plaintiffs have not sought to establish, contrary to the state finding, that the promissory note was executed "under duress." What they seek to litigate here is the narrower, previously undecided issue of whether Kornfeld, acting on behalf of the motion picture distributors, made a threat to deprive the plaintiffs of film in violation of the federal antitrust laws.

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[9]In Talcott v. Allahabad Bank Ltd., 444 F.2d 451, 459-60 (5th Cir. 1971) the court stated: "[W]here a question of fact is put in issue by the pleadings, and is submitted to the jury or other trier of fact for its determination, and is determined, that question of fact has been 'actually litigated.' " Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 666, 671 (1944). See generally Restatement of Judgments § 68, comment (c) (1942).

[10]We thus reject the plaintiffs' contention that the doctrine is inapplicable because the standard of duress in a federal antitrust action is somehow different from the standard applied in a state action. Our review of the cases establishes that elements necessary to prove duress are the same in federal and state courts. *See e.g.*, Jack Winter, Inc. v. Koratron Co., 329 F.Supp. 211, 213 (N.D. Cal. 1971).

It is the defendant's contention that a finding that no such threat was made is implicit in and essential to Judge Ryan's conclusion that there was no duress.

As was stated previously, Judge Ryan found that there was not "sufficient and convincing evidence of duress." Obviously, that decision required an examination of the facts and circumstances surrounding the execution of the $70,000.00 note. The exhibitors argued that the auditor, Kornfeld, advised them at the February 12, 1971 meeting that unless the instrument was signed, his principals, the nine motion picture distribution corporations, would supply no more film. Fearing that they would be forced out of business, the exhibitors claimed that such threats denied them the exercise of free will and that the note was executed in response to the threats, and for no other reason. The noteholder, of course, denied any such threats were made.

While the state court concluded that the promissory note was enforceable, Judge Ryan made no explicit findings as to why the defense of duress had not succeeded. The defendants here argue that the finding of no duress necessarily was predicated on a finding that no threat was made. In other words, the defendants ask this Court to *equate* a finding of no duress with a finding of no threat.

(b)

Generally, duress may be said to exist whenever one party exerts pressure on another which induces the other to enter a contract or otherwise act under circumstances which deprive the person pressured of the exercise of free will. *See generally* 25 Am.Jur.2d, Duress and Undue Influence, § 1; 17 C.J.S., Contracts, § 168; Restatement of the Law of Contracts, § 492. In Virginia, the pressure exerted, whether by action or by threat, must be "wrongful." *E.g., Bond* v. *Crawford*, 193 Va. 437, 69 S.E.2d 470, 475 (1952).[11] Moreover, it has been held in Virginia, that duress, as a species of fraud, "must be clearly proved," *Ford* v. *Engleman*, 118 Va. 89, 86 S.E. 852, 855 (1915), and that it is "not readily accepted as an excuse."

[11] In *Bond*, the Court clearly stated that "a threat to do what one has the legal right to do . . . is not such duress as to justify rescission of a transaction induced thereby." 69 S.E.2d at 475.

Seward v. *American Hardware Co., Inc.*, 161 Va. 610, 171 S.E. 650, 662 (1933). *See also Cary* v. *Harris*, 120 Va. 252, 91 S.E. 166 (1917).

While the language used to define duress differs from jurisdiction to jurisdiction,[12] "underlying all definitions of 'duress' is the dual concept of external pressure and internal surrender, or loss of volition in response to outside compulsion." 17 C.J.S., *supra*, at 943. The authorities are in agreement that the ultimate fact to be determined whenever the question of duress is raised is whether the purported victim's will was so overcome as to deprive him of free choice. *See generally* 25 Am. Jur.2d, *supra*, § 3, at 353 and 355-57; 17 C.J.S., *supra*, at 948. In this regard a threat, demand, or act which falls short of subverting the will of the victim cannot constitute duress, notwithstanding the fact that the threat, demand, or act is itself wrongful.

Judge Ryan, in holding that the note was not executed under duress, did not indicate which of the two elements was lacking. Rather, he merely stated that his legal conclusion turned on questions of fact and, as trier of the facts, he resolved them in favor of the noteholder. If the only manner in which Judge Ryan could have "resolved the facts" consistent with his ultimate finding of no duress was to determine that no threat was made, we could infer that necessary, even though unarticulated, fact and plaintiffs here would be collaterally estopped from asserting in this Court that a threat was made.[13]

There are, however, at least three ways in which Judge Ryan could have "resolved the facts" in order to reach the ultimate finding of no duress. First, he could have found no threat was made. Second, he might have found that a lawful threat was made. A third, yet equally plausible finding could have been that an unlawful threat was made but did not deny the victim the exercise of his free will. Thus, it is impossible to infer from Judge Ryan's ultimate finding of no duress only one set of facts necessary to that determination.

[12] *See, e.g.*, 17 C.J.S., Contracts, § 168 at 942-43 and cases there cited.

[13] Professor Moore states that "if the rendering court made no express findings on issues raised by the pleadings or the evidence, the court may infer that in the prior action a determination appropriate to the judgment rendered was made as to each issue that was so raised and the determination of which was necessary to support the judgment." 1B Moore's Federal Practice ¶ 0.443[4] at 3913. As to the use of the "necessary inference," see James Talcott, Inc. v. Allahabad Bank, Ltd., *supra*, at 460.

The Supreme Court has stated, however, that to discover precisely what questions were determined by the judgment in a prior action, we may go behind the judgment and examine the pleadings and evidence in the prior action to determine which facts were essential to the judgment there rendered. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 459 (1922); *Russell* v. *Place*, 94 U.S. (4 Otto) 606, 608 (1876).

Our review of the state court pleadings, record, and opinion, does not establish whether Judge Ryan found that a threat was or was not made. Accordingly, the doctrine of collateral estoppel in no way precludes litigating that fact in this action since it is clear that Judge Ryan could have decided that the note was not executed under duress whether or not he found that a threat was made.

We have discussed, in some detail, what was decided in the former action and the distinction between a finding of no duress and the finding that no threat was made. The reason for so doing is apparent. While it may be argued the above distinction is merely semantical, our review of the law of duress establishes that two elements are essential. A threat (or other unlawful demand or act) is merely one element and thus the words "threat" and "duress" cannot be equated. The importance of the distinction for purposes of this action is also illustrated by the question which the jury submitted to the Court during its deliberations. It read: "Is the *threat* made by the defendant to the plaintiff in reference to the film cut off considered to be a violation of the Anti-Trust law?" (Emphasis added). The question clearly indicates that the jury was focusing not on the issue of duress, but upon the narrower question of whether a threat was made, and if so, its effect.[14]

For the reasons previously stated we hold that plaintiffs are not collaterally estopped from litigating in this action the question whether a threat was made notwithstanding the previous finding in the state proceedings that the $70,000.00 note was not executed under duress. Accordingly, as to this

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[14]Were we of the opinion that the jury, in reaching its verdict, resolved (or attempted to resolve) the question of duress contrary to the resolution made in the state proceedings, we would grant a new trial. We are confident, however, that the jury never reached that issue, focusing instead upon the narrower, previously undecided question of whether a threat was made.

issue, defendants' motions for judgment notwithstanding the verdict, or for a new trial, are DENIED.

III

SUFFICIENCY OF THE JURY VERDICT

The second major issue raised by the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is whether there is sufficient evidence to support the verdict of the jury. In considering these motions, we start with the proposition that the evidence must be viewed in the light most favorable to the plaintiffs. *Gallick* v. *B & O Ry.*, 372 U.S. 108 (1963); *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107, 109 (1959); *Lavender* v. *Kurn*, 327 U.S. 645, 653; *Warner* v. *Billups Eastern Petroleum Co.*, 406 F.2d 1058, 1059 (4th Cir. 1969); *Burcham* v. *J. P. Stevens & Co., Inc.*, 209 F.2d 35, 37 (4th Cir. 1954). If, resolving all evidentiary conflicts in favor of plaintiffs and giving them the benefit of every reasonable inference, there is evidence upon which the jury reasonably could return a verdict in favor of plaintiffs, judgment n.o.v. should not be granted. *Mays* v. *Pioneer Lumber Corp.*, 502 F.2d 106, 108 (4th Cir. 1974); *American Realty Trust* v. *United States*, 498 F.2d 1194, 1198 (4th Cir. 1974); *Warner* v. *Billups Eastern Petroleum Co., supra; Tedder* v. *Merchants & Manufacturers Ins. Co.*, 251 F.2d 250, 254 (4th Cir. 1958); *Burcham* v. *J. P. Stevens & Co., Inc., supra. See also Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690 (1962).

It is solely the prerogative of the jury to weigh the credibility of the witnesses, resolve contradictory evidence and inferences, and to render the ultimate conclusion as to the facts. *Continental Ore Co.* v. *Union Carbide Corp., supra* at 700-701; *American Realty Trust* v. *United States, supra.* The jury, as factfinder, can "discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946). This Court is powerless to reject the findings and inferences of the jury and substitute its judgment therefor, if there is "any evidence in the case that would authorize a verdict for the plaintiff." *Tedder* v. *Merchants & Manufacturers Ins. Co., supra* at 254. *See Gallick* v. *Baltimore & Ohio*

R. Co., 372 U.S. 108, 114-15 (1963); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110 (1959); *See also* this Court's discussion of these issues in *Felts* v. *Seaboard Coast Line R. Co.*, 55 F.R.D. 497, 498-500 (E.D. Va. 1971).

With these principles in mind, we have examined and re-examined the record. The case was submitted to the jury solely on the issue whether the defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1.[15] That section declares illegal "[e]very contract, combination . . ., or conspiracy, in restraint of [interstate] trade or commerce . . . ."

Defendants contend that to recover in this action plaintiffs must establish three elements: (1) a combination or conspiracy among the defendants to unreasonably restrain interstate trade or commerce; (2) that the auditor, who threatened discontinuance of film service, was acting within the scope of his employment as agent for the distributors and clothed with authority (either actual or apparent) to so threaten; and (3) that as a result of (1) and (2), plaintiffs suffered damage to their business or property. Defendants argue strenuously that plaintiffs have offered *absolutely no evidence* on any of these points.

We would be less than candid if we did not state that the evidence in the case was conflicting and did not make out a strong case. A different finding could easily have been reached. However, the rule in this Circuit is clear. Judgment n.o.v. should not be granted unless the evidence is "so clear that reasonable men could reach no other [conclusion]" than the one suggested by defendants. *Burcham* v. *J. P. Stevens & Co.*, *supra* at 38; *American Realty Trust* v. *United States*, *supra* at 1198.

As factfinder, the jury resolved the facts in favor of plaintiffs. The verdict establishes that they chose to believe plaintiffs' witnesses. The conflicts in testimony were resolved in favor of plaintiffs. The fact the Court may have resolved the facts in favor of defendants does not mean that there is no evidence in this case which supports the verdict of the jury.

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[15] As was stated previously, the issues of price fixing and monopolization were dropped from the case prior to its submission to the jury. *See* notes 3 and 4, *supra*, and accompanying text.

On the question of a conspiracy or combination among the defendants, there is no direct evidence; but the jury could have reasonably inferred from the circumstantial evidence that the defendants were acting in concert.[16] There is no evidence that the agent of the distributors, Kornfeld, had actual authority to threaten a discontinuance of film service, but his apparent authority to so threaten may reasonably be inferred from the evidence. Finally, the evidence establishes the fact that plaintiffs were injured by the acts of defendants and this Court may not substitute its judgment for that of the jury with respect to the amount of damages.[17]

For the reasons given above, defendants' motions for a directed verdict and to set aside the verdict and enter judgment n.o.v. or, in the alternative, for a new trial, are DENIED.

Richard B. Kellam
United States District Judge

Norfolk, Virginia

February 25, 1975

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[16] The principle is well settled that a combination or conspiracy in violation of the Sherman Act may be established by circumstantial, as well as direct, evidence. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); Eastern State Retail Lumber Dealers Assn. v. United States, 234 U.S. 600 (1913); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Paramount Pictures, 334 U.S. 131. *See generally* 54 Am.Jur.2d, *Monopolies, Restraints of Trade, and Unfair Trade Practices*, § 21 *et. seq.*

[17] Once the fact of damages is established, precision is not required in fixing the amount. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Southeast Coal Co. v. Consolidated Coal Co., 434 F.2d 767, 794 (6th Cir. 1970); Warner v. Billups Eastern Petroleum Co., 406 F.2d 1058, 1060 (4th Cir. 1969). While speculation is improper, the jury may make a "just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' " Bigelow v. RKO Radio Pictures, Inc., *supra* at 264 *quoting from* Story Parchment Co. v. Paterson Co., 282 U.S. 555, 561-64 (1931). *See also* Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc., F.2d (4th Cir. January 21,1975.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

AZALEA DRIVE-IN THEATRE, INCORPORATED, ET AL.,	]	
Plaintiffs	]	
v.	]	CIVIL ACTION NO. 73-347-N
EDWARD A. SARGOY, JOSEPH L. STEIN, and BURTON H. HANFT, ET AL.,	]	
Defendants	]	

O R D E R
(Filed September 17, 1973)

THE COURT FROM THE BENCH:

Mr. Sacks, I do not have any trouble with this. As a United States District Judge, I want to stay as far away from unduly interfering with the orderly processes of the state courts as it is possible to do so. I have to live with a state court judge, and I know his sentiments, though, of course, that is not authority for my action today.

It is my view that a litigant ought not to ask a federal court to hold up a suit that is properly proceeding in a state court and to assert a seemingly superior position to the state court. This is true in this case particularly.

Here is a suit on a note that has been pending in the Circuit Court of Norfolk before Judge Ryan for over two years. The question of the defense of the federal anti-trust statute has

been raised and has been ruled upon, and, I believe, correctly so. The trial of the case is now set ten (10) days hence. Now an effort is made in this federal court under 28 U.S.C.A. § 2283 to decide that that state case should not proceed and that I should issue an injunction.

I OVERRULE your motion for a temporary injunction, and state as my authority Judge Winter's opinion in the district court case of *Howard D. Potter v. Carvel Stores of New York, Inc.*, 203 F.Supp. 462 (Md. 1962), *affirmed* in the Fourth Circuit. In the body of his opinion, on page 564, he substantially says what I have just told you, that the exceptions that have been written into § 2283 do not include anti-trust and are not such as to put your case within those exceptions. The federal court here has no statutory authority, which it must have in my judgment, to issue an injunction to the state court, and it is not in my authority to interfere.

Furthermore, in *Reines Distributors, Inc. v. Admiral Corporation*, 182 F.Supp. 226 (S.D.N.Y. 1960), which is right on point with this case, in the opinion, on page 227, Judge Metzner found that there was no authority in the United States in a state suit on a note to which anti-trust defenses were asserted, to in any wise interfere with such state proceedings.

I am familiar with *Kelly v. Kosuga*, 358 U.S. 516 79 S.Ct. 429 (1959). I had that in *Royster Company v. Columbia Nitrogen*, 451 F.2d 3 (4th Cir. 1971), and as I recall it, the defense of anti-trust was not available in a breach of contract suit, and we are back to the same point here.

You may have this written up and I will reserve the right to annotate the statement from the bench by putting in any other authorities that I think are necessary, but I am not going to make any other written order unless you request it.

COPIES FORWARDED TO COUNSEL PRESENT.

Certified Original Transcript

J. W. Zahn
Official Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

AZALEA DRIVE-IN THEATRE, INCORPORATED, ET AL.,	]	
Plaintiffs	]	CIVIL ACTION
v.	]	NO. 73-347-N
EDWARD A. SARGOY, ET AL.,	]	
Defendants	]	

O R D E R
(Filed April 5, 1974)

This Court respectfully declines the plaintiffs' invitation to enjoin the defendants from pursuing enforcement of a state court judgment.

We do not find any jurisdiction so to do in 28 u.S.C. § 2283, since we do not find such a stay as requested to be authorized by statute, nor necessary in aid of the jurisdiction of this Court, nor necessary to protect or effectuate any judgment rendered herein in a future federal trial of the matters pending.

We refused this same application for a stay of the state action when the case was poised for trial and this federal anti-trust complaint had just been filed. We adhere to that ruling. In that decision we are buttressed by *Lyon, et al. v. Westinghouse Electric Corp., et al.*, 201 F.2d 510 (2d Cir. 1953).

Lyons v. Westinghouse Electric Corporation, 222 F.2d 184 (2d Cir. 1955), cited by the plaintiffs as authority for their requested stay is, in our opinion, authority to the contrary, that is, that the federal action could not be stayed to await final judgment in a state proceeding then pending on appeal. If anything, that case would appear to support the proposition

that the state case in which anti-trust violations were sought to be interposed as a defense (as here) and the federal anti-trust suit (as here) should proceed independently of each other.

Motion for injunction is DENIED.

The pending motion of defendants to file an amended answer has previously so been, and is, GRANTED.

The pending motion of defendant, Hanft, to dismiss has previously so been, and is, DENIED.

J. MacKenzie
United States District Judge

Norfolk, Virginia
April 4, 1974

Virginia: In the Supreme Court of Virginia

AZALEA DRIVE-IN THEATRE, INCORPORATED,
and TWIN DRIVE-IN THEATRE, INC.

OPINION BY CHIEF JUSTICE LAWRENCE W. I'ANSON
-v- Record No. 740472 Richmond, Virginia, April 28, 1975

EDWARD A. SARGOY, JOSEPH L. STEIN
and BURTON H. HANFT, d/b/a SARGOY,
STEIN & HANFT (a partnership)

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Edward L. Ryan, Jr., Judge

Plaintiff, Sargoy, Stein & Hanft (Sargoy), instituted this action against defendants, Azalea Drive-In Theatre, Incorporated, and Twin Drive-In Theatre, Inc. (defendants), to obtain a judgment on a promissory note dated February 12, 1971, in the amount of $70,000, together with interest and a reasonable attorney's fee. Defendants filed a responsive pleading and numerous affirmative defenses, one of which alleged that the note was void because it was procured in violation of the Sherman Anti-Trust Act and the Robinson-Patman Act. Defendants also filed a counterclaim for treble damages based upon alleged violations of these two antitrust acts.

Sargoy moved to strike defendants' affirmative defense based upon the federal antitrust laws because such defense was not available in this State court action. Sargoy also filed a plea in abatement to defendants' counterclaim asserting that federal district courts have exclusive jurisdiction to entertain federal antitrust actions. The motion to strike and the plea in abatement were sustained by the trial court.

Defendants' request for a jury trial was denied by the trial court because the note sued on provided that the right to a jury trial was waived by defendants in any litigation resulting from a default on the note.

After hearing evidence, the trial judge stated in an opinion letter that the legal issues presented turned on issues of fact and, as the trier of fact, he was resolving the issues in favor of

Sargoy. Judgment was accordingly entered for Sargoy for the full amount of the note, together with interest and attorneys' fees.

The evidence shows that Earnest H. Price was the sole stockholder and operator of the Azalea and Twin Drive-In Theatres, located in Norfolk, Virginia. Films for the two drive-ins were rented from nine major distributors, who represented at least 75% of the total motion picture distribution companies in the country. The standard rental fee was 40% of the paid admissions less sales tax. To ensure that the total admissions were accurately reported by the drive-ins (commonly known as exhibitors in the industry), the rental contracts contained a clause permitting the distributors or their agents to audit the exhibitors' records.

In November 1970 Sargoy, a New York law firm representing the nine distributors, notified defendants that it was sending Philip Kornfeld, an auditor, to Norfolk to audit the records of the two theatres. After an audit of the accounts covering a five-year period, Kornfeld came to the conclusion that defendants had underreported admissions in the sum of $220,000.

Kornfeld arrived at this figure by comparing concession receipts to admissions on those nights when defendants knew admissions were being independently counted. The concession receipts were approximately 48.5% of the admission receipts when defendants knew they were being checked. However, on nights when "blind checks" were conducted, the percentage of concession receipts to admissions varied from 55% to 75%, indicating that not all of the admissions had been reported.

Another indication that there was underreporting was that the national average of persons per car entering a drive-in theatre was 2.2. Defendants' records did not reflect this national average.

At a meeting held on February 12, 1971, Kornfeld advised both Price and his accountant, Carl J. Katz, what his audit showed and told them that the unreported admissions represented a claim against defendants in the amount of $88,000.

Price and Katz testified that they questioned the accuracy of Kornfeld's figures, but they said Kornfeld told them that, if defendants did not agree to a settlement that day, defendants would not receive any more films. Kornfeld repeatedly denied making this threat.

Price and Katz then held a private conference and decided that it would be best for Price to accept some form of agreement to avoid having his film supply cut off, which would put the theatres out of business. A compromise figure of $70,000 was finally agreed upon with Kornfeld. At this time Price, as president of the two corporations, signed a note payable to Sargoy in the agreed amount. The note was to be paid over a three-year period and the first payment was due June 1, 1971. Two $7,500 checks were to be held in escrow for the first payments on the note.

Kornfeld then asked Price to sign a settlement agreement which purported to release any further claims against defendants arising out of the audit period ending on December 31, 1970. Price stated that he wanted his attorney to review the agreement before he signed it. Kornfeld agreed to this and asked Price to mail the agreement to him after his attorney had read it and Price had signed it for the corporations.

The settlement agreement provides, in pertinent part:

> "In order to settle and resolve the questions and controversies between the Exhibitor and each respectively of said Distributors involving or in any way connected with each and any said Released Theatre(s), and to effect a mutual exchange of releases as to Released Theatre(s) between the Exhibitor and each said respective Distributor, in the content and form of the accompanying Schedule A (which is the typical form of mutual exchange of release contemplated by this agreement), it is mutually agreed as follows:
>
> . . . .
>
> "4. Upon confirmation of acceptance it is further mutually agreed that the Exhibitor shall be deemed to have entered into and effected a mutual exchange of release with each separately of the above named Distributors, in the form of the accompanying Schedule A which is made a part hereof for such purposes . . . . .
>
> . . . .

> "8. IN WITNESS WHEREOF, this offer of settlement has herewith been executed by the Exhibitor, which upon confirmation by Sargoy & Stein of acceptance hereof as above provided, shall be deemed to be the settlement agreement of the respective parties hereto, with the effective release date hereof for the purpose of the releases provided herein being the day preceding the 31st day of December, 1971." (Date handwritten.)

Kornfeld later discovered that he had mistakenly written the effective release year as 1971 in the agreement instead of 1970. He said that he called Katz on the telephone and informed him of the mistake and that Katz stated that he would see to it that the date was changed. Katz denied receiving any such call from Kornfeld.

Kornfeld delivered the note and two $7,500 checks to David Fallick, his superior, in New York. Fallick testified that one of the dates on the checks had been changed and suggested that Kornfeld get a replacement from Price. On March 3, 1971, Fallick received, and acknowledged receipt of, the settlement agreement signed by Price, as president of the corporations, and the revised check.

Upon examination of the settlement agreement, Kornfeld noticed that the date of the effective release on the agreement had not been changed from 1971 to 1970, as he had requested Katz to do. Kornfeld then changed the date himself.

After receiving the settlement agreement, Fallick sent letters to all nine distributors asking them if they would accept a certain percentage of the $70,000 in settlement for their claims. Written acceptances were received from seven distributors and oral acceptances from the remaining two.

Burton H. Hanft, attorney for Sargoy, testified that he signed the settlement agreement on behalf of the distributors. He stated that plaintiffs had been the attorneys and agents for the nine distributors for the past thirty years; that all the distributors had given him the authority to accept the settlement agreement in this particular case; and that he had communicated this authority to defendants.

On April 2, 1971, Fallick wrote a letter to Price informing him that the distributors had accepted the agreement. He enclosed a separate mutual release from each distributor for Price

to sign and return. On May 3, 1971, Fallick again wrote Price asking him to sign and return the releases. He received no response from Price.

The next word that Fallick received on the matter was a phone call and a letter from defendants' attorney three days before the first installment on the note was due, stating that defendants did not intend to go through with the settlement and that a "stop payment" order had been placed on the two checks.

Defendants' first contention is that the trial court erred in striking its affirmative defense based upon violations of the Sherman Anti-Trust Act and the Robinson-Patman Act. They argue that the note was unenforceable because it was illegally procured under threat of refusing to supply them with films in violation of the federal antitrust acts. We do not agree.

This issue has been resolved against defendants by the United States Supreme Court in the cases of *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). In *Bruce's Juices* the vendor of canned goods brought suit against the buyer, Bruce's Juices, Inc., to recover on several renewal notes upon which the buyer had defaulted in payment. The buyer alleged that the notes were illegal and void because the vendor discriminated against it in violation of the Robinson-Patman Act.

The sole issue to be decided by the Court was "whether renewal notes representing the purchase price of goods sold and delivered are uncollectible if it is found that the vendor violated the Robinson-Patman Act . . . ." *Bruce's Juices, supra*, 330 U.S. at 744. In affirming the decision of the Supreme Court of Florida in favor of the plaintiff, American Can Co., the Court stated:

> "If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. It is only when the court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination . . . that the basis of the defense asserted here appears." *Id.* at 756. (Footnote omitted.)

The Court further stated that, if defendant could actually prove its charge, it could sue the plaintiff for treble damages under the Robinson-Patman Act. However, any such claim, whether in the form of a motion for judgment or a counterclaim, is within the exclusive jurisdiction of the federal district courts and cannot be entertained by a state court.

The Supreme Court stated the rationale behind this rule in *Kelly* v. *Kosuga, supra*, in which it affirmed a district court in striking a defense, based upon the Sherman Anti-Trust Act, to a suit for the collection of the purchase price for fifty train carloads of onions. There the Court stated:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. . .In D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165. . . .[t]he Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. . . .Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law,. . .still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act. [Citations omitted.]
>
> . . . .
>
> "Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price . . . . [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." 358 U.S. at 518-19, 521. (Footnote omitted.)

See also Medusa Corporation v. *Gordon*, 496 F.2d 249 (6th Cir. 1974); *Response of Carolina* v. *Leasco Response, Incorporated*, 498 F.2d 314 (5th Cir. 1974); *Appalachian Power Company* v. *Region Properties, Inc.*, 364 F.Supp. 1273, n. 11 at 1278 (W.D. Va. 1973); *N.Y.Stock Exchange, Inc.* v. *Goodbody & Co.*, 42 A.D.2d 556, 345 N.Y.S.2d 58 (1973); *Polycast Technology Corporation* v. *Rohm & Haas Company*, 305 A.2d 323 (Del. 1973). *Cf. Big Top Stores, Inc.* v. *Ardsley Toy Shoppe, Ltd.*, 315 N.Y.S.2d 897 (N.Y.Sup.Ct. 1970).

In the instant case, the amount of the note represented a compromise of the amount found to be due on account of unreported admission receipts. For Sargoy to make out a prima facie case on the promissory note, the genuineness of the signatures being admitted by defendants, it needed only to produce the instrument. This entitled Sargoy to recover in the absence of any further evidence or defense established by defendants. Code § 8.3-307(2); *Cox* v. *Parsons*, 165 Va. 575, 577, 183 S.E. 440, 441 (1936); *Holdsworth* v. *Anderson Drug Co.*, 118 Va. 359, 361, 87 S.E. 565, 566 (1916). The alleged federal antitrust violation was collateral to the main issue in plaintiff's motion for judgment, and it was not a viable defense in this action. Here, the enforcement of the promissory note in no way furthers the alleged illegal activity of Sargoy and the distributors.

Defendants contend that the trial court erred in denying them a jury trial because the note was illegally procured under a threat to cut off their film supply in violation of the federal antitrust laws, and that the jury waiver provision in the note suffers the same infirmity as the note itself.

The validity of a provision in an instrument waiving a jury trial, made independently of pending litigation, has been upheld in a great number of cases. However, the jury waiver provision has been held to be invalid when the instrument in which it is contained is void. 47 Am.Jur.2d, "Jury," § 86 at 700 (1969). *See also* Annot., "Contractual Waiver of Jury Trial," 73 A.L.R.2d 1332, 1336.

Since the provision in the note waived a jury trial, and we have held that in the present case the alleged violation of the federal antitrust laws is not a viable affirmative defense to this action on the note, we hold that the trial court did not err in denying the defendants' motion for a trial by jury.

Defendants next contend that their offer of settlement was contingent upon the nine distributors executing separate releases with the defendants, which was never done. Thus they argue that their offer of settlement was never accepted. We do not agree.

Paragraph 4 of the settlement agreement is clear and unambiguous. It provided that upon acceptance of the settlement agreement by the distributors defendants "shall be deemed to have entered into an effective and mutual exchange of release with each" of the distributors.

The evidence shows that the settlement agreement was signed by defendants and received by Sargoy on March 3, 1971. It was accepted by the distributors pursuant to Fallick's letter of April 2, 1971. Consequently, the settlement agreement, in accordance with its terms, became binding on all the parties without the execution of the releases. Moreover, defendants cannot now complain that they did not receive releases from the distributors because they never returned them for the signatures of the distributors or their authorized agents.

Defendants assigned other errors which were not urged in oral argument before us. However, we have considered the alleged errors and find no merit in any of them. Most of those alleged errors were based on factual issues and, since there is evidence to support the findings of the trial court, a discussion of them would serve no useful purpose. *See White and P & W Oil Co.* v. *Perkins*, 213 Va. 129, 134, 189 S.E.2d 315, 319 (1972); *Spence* v. *Spence*, 212 Va. 431, 435, 184 S.E.2d 763, 765-66 (1971).

For the reasons stated, the judgment of the court below is

Affirmed.

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1028

AZALEA DRIVE-IN THEATRE, INCORPORATED and TWIN DRIVE-IN THEATRE, INC.,

Petitioners,

against

BURTON H. HANFT, individually, and d/b/a SARGOY, STEIN & HANFT (a Partnership), formerly known as Sargoy & Stein, Attorneys, DAVID FALLICK, PHILLIP KORNFELD, PARAMOUNT PICTURES CORP., METRO-GOLDWYN-MAYER, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WARNER BROTHERS DISTRIBUTING CORPORATION, BUENA VISTA DISTRIBUTION COMPANY, INC., UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES INDUSTRIES, INC., and AMERICAN INTERNATIONAL PICTURES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The only question presented by this petition is whether a party who has fully litigated a factual issue in a state court may relitigate the identical factual issue in a subse-

quent federal action. The five "questions" posed by petitioners are merely contentions relating to this question, but we shall, nevertheless, respond to those contentions *seriatim*.

Statement of the Case

This is a highly tenuous (see, *e.g.*, 22a)* antitrust action by motion picture drive-in theatres (hereinafter "Azalea") against nine distributors and Sargoy, Stein & Hanft (hereinafter "Sargoy"), the law firm retained by these distributors to verify the exhibitors' compliance with the provisions of their exhibition agreements. The claim upon which the action is based was belatedly contrived as a means of circumventing liability under a valid promissory note. The facts are, briefly, as follows:

Most of the motion pictures licensed by the distributors to Azalea were licensed under "agreements providing for a payment of a percentage of a theatre's box-office receipts to the distributor" (3a). The distributors were expressly authorized by the agreements "to make periodic inspections and to audit the books of the theatre in order to insure that the theatre is not underrepresenting box office receipts," and they retained Sargoy "to conduct the required investigations" (*Id.*). Sargoy arranged for the employment of independent "checkers" to visit Azalea's theatres, and the reports of those checkers indicated underreporting of box office receipts, so that Sargoy then sent an auditor to

* Numerical references followed by "a" are to pages in the Appendix to the petition for certiorari, whereas those preceded by "A" are to pages of the Joint Appendix in the Court of Appeals. References preceded by "Tr." are to the transcript included in the record in that court.

examine the exhibitors' records (A221-22). On the basis of the checking analysis and the records supplied by Azalea, "the defendants estimated that there had been underdisclosure and underreporting by as much as $240,000" (*Id.*). As the Court of Appeals found, the checkers' "testimony was strongly corroborated by objective evidence obtained from the independent concessionaire" (5a, n.1).*

After lengthy discussions, Azalea, on February 12, 1971, offered to pay $70,000 in settlement of the distributors' claim, and delivered a promissory note for that amount, together with post-dated checks for the first installment, to Sargoy (A122, A341, A378). That offer was accepted (A167). Azalea never asserted or intimated that the note had been obtained from them by coercion, duress or antitrust violation until their answer in the Virginia court action on April 10, 1972—*fourteen months* after they had delivered the note—although there were several communications between Azalea or their attorneys and Sargoy in which such an assertion, if true, would certainly have been made.

* The receipts from the independent concessions for the sale of food and drink were checked against the reported box office receipts and a comparison was made between the ratios derived on "open check" days, when Azalea knew the theatres were being checked, and those for "blind check" days, when Azalea did not know they were being checked (A247-50). On open check days those receipts amounted to 42 percent of the reported box office receipts, whereas on adjacent days when the theatres were blind checked and the same feature was showing the concession sales were in excess of 80 percent of the reported box office receipts (A454-57). As was observed in *LCL Theatres* v. *Columbia Picture Industries*, 421 F.Supp. 1090, 1094 (N.D. Tex. 1976), a similar case: "Either the theatre audiences experienced greater appetites for food and drink on blind check days than open check days or the managers were 'dumping' portions of the box office receipts into the concession sales."

The Prior State Court Action

After Azalea had defaulted under the $70,000 promissory note, Sargoy, on November 15, 1971, instituted an action against Azalea on that note in the Virginia State Court. On April 10, 1972, Azalea filed an answer admitting execution of the note (A153, A155) and asserting, by way of affirmative defense, that it had been obtained under duress:

> "The instrument sued on herein was obtained from defendants [Azalea] by plaintiffs [Sargoy] by *duress* * * * when plaintiffs and their principals did *threaten* that plaintiffs' principals, who are movie distributors, would *refuse to deal* with defendants [and] * * * they * * * did further exert such *coercion* and *economic pressure* that the defendants, fearful of the possible consequences of the actions *threatened,* signed the instrument * * * *solely as the result of the aforesaid threats* and for no other reason" (A154) (emphasis supplied).

Azalea also interposed an additional affirmative defense and counterclaim based on the same facts, but which characterized those facts as violations of the Sherman Act (A155). That antitrust defense and counterclaim was dismissed as not cognizable by the state court, under such established authorities as *Kelly* v. *Kosuga,* 358 U.S. 516 (1959) (A161).

The action was tried by the court without a jury, and the court rendered its decision in favor of Sargoy on January 4, 1974 (A149). The trial court rejected Azalea's defense that the note had been obtained under duress, by the threat of a group boycott, holding:

> "As the trier of the facts, the court decides same in favor of the plaintiffs [Sargoy]" (A150).

Azalea appealed the judgment to the Supreme Court of Virginia and assigned as error, *inter alia,* the "finding that the note and offer of settlement by defendants, made on February 12, 1971, and thereafter were not made under and as a direct result of coercion and duress" (A188). The judgment, including the finding of no duress, was unanimously affirmed by that court on April 28, 1975.

Azalea then petitioned this Court for certiorari, and the petition was denied. *Azalea Drive-In Theatre, Incorporated* v. *Sargoy,* 423 U.S. 940 (1975).

The Proceedings Below

Azalea filed the complaint in the case at bar on August 30, 1973 (A1). It charges, in substantially the same language as the duress defense in Azalea's state court answer (*supra,* p. 4):

> "That sometime prior to the year 1970, and for a long and continuous time * * * the defendants * * * engaged in an unlawful combination and conspiracy and unreasonable restraint of * * * interstate trade and commerce * * * [in that] defendants * * * did conspire to *force* the [plaintiffs] * * * and did illegally, wrongfully and by monopolistic and *economic threat, coercion* and *duress,* obtain from plaintiffs a certain indebtedness in the amount of $70,000, which they continue to hold in effecting a tying arrangement that required plaintiffs to so execute such a note as an absolute condition of continuing to obtain motion picture films from said distributors * * *" (A8, A12-13) (emphasis supplied).

Defendants' answers consisted of general denials and, after the entry of judgment in the state court action, were

supplemented by the affirmative defense of collateral estoppel.

The "coercion" upon which the instant action is based consists of an alleged threat by Sargoy's auditor of "a group boycott," *viz.*, that unless Azalea delivered the note, the distributors would not license pictures to them—a threat which was unequivocally denied (4a; A332-33). However, as Azalea repeatedly conceded, no distributor ever boycotted or discontinued service to them, and they did not lose any business or suffer any damages by reason of any such boycott (A394, A411, A413).* Nor was there any evidence that any distributor had ever, at any time, threatened to boycott Azalea or any other exhibitor (*Id.*).

The Court of Appeals held that the alleged coercion was identical with the coercion urged and rejected in the state court action (4a), and the issue having been litigated and decided there in favor of defendants herein, it "was not open to relitigation in the district court" (5a).

* Petitioners' statement (p. 4) that the distributors, by retaining Sargoy, "compell[ed] individual exhibitors to pay higher film rental prices" is an outright misstatement of the record. Not only was there not one iota of evidence to that effect (page 213 of the transcript, cited by petitioners, is completely irrelevant), but the trial judge expressly refused Azalea's request to instruct the jury that Azalea claimed a conspiracy "to fix prices" (Tr. 581, 589, 655). Thus, Azalea's own counsel stated to the court before the charge: "You have ruled out price-fixing" (Tr. 588).

ARGUMENT

I

The decision of the Court of Appeals neither "undermines" nor "constitutes a radical departure from" the federal decisions on collateral estoppel but, on the contrary, is fully supported by them.

Concededly, both the state court defense and the instant action were founded upon exactly the same alleged threat of a group boycott by Kornfeld, an auditor employed by Sargoy. Indeed, the testimony given in the state court was repeated almost verbatim at the trial herein and, as above indicated, the allegations of the pleadings were virtually identical. As was held by the Court of Appeals:

> "any issue of ultimate fact which was actually litigated and necessarily determined in a prior action cannot again be litigated between the same parties. *Yates* v. *United States*, 354 U.S. 298, 335-36 (1957); *United States* v. *Davis*, 460 F.2d 792, 795-96 (4th Cir. 1972)" (5a).

Moreover, it has been repeatedly and uniformly held that collateral estoppel, by a federal or state court judgment, applies in a subsequent antitrust litigation. *Granader* v. *Public Bank*, 417 F.2d 75 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Ellingson Timber Co.* v. *Great Northern Ry. Co.*, 424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Household Goods Carriers' Bureau* v. *Terrell*, 417 F.2d 47 (5th Cir. 1969); *Fleischer* v. *Paramount Pictures Corp.*, 329 F.2d 424 (2d Cir.), *cert. denied*, 379 U.S. 835 (1964); *Singer* v. *A. Hollander & Son, Inc.*, 202 F.2d 55 (3d Cir. 1953); *Collidotronics, Inc.* v. *Stuyvesant Insurance Co.*, 290 F.Supp. 978 (E.D. Pa. 1968).

In an effort to circumvent this established principle, the petition (p. 11 *et seq.*) poses two possible alternative interpretations of the rationale of the state court judgment, other than that no threat was actually made. Neither of these, however, can withstand scrutiny.

(1) The first is that the state court might have decided that the alleged threat was not "unlawful under state law." That hypothesis, however, is palpably impossible, and contrary both to the facts and the law. The only threat alleged was a threat of "a group boycott," whereby Azalea was coerced into executing the $70,000 promissory note (3a). Such a threat is and always has been unlawful under Virginia law.

It is the law of Virginia that a violation of the Sherman Act constitutes a violation of the Virginia antitrust statute, Va. Code Ann. §§59.1-22 and 1-23 (1968), which prohibits any combination the purpose of which is, among other things, "to create and carry out restrictions in trade or business." *Blue Cross* v. *Commonwealth,* 211 Va. 180, 192, 176 S.E.2d 439, 446 (1970) (holding that a combination to fix or stabilize prices, which is a *per se* federal violation, violates Section 59.1-23 "for the same reasons"); *Hercules Powder Co.* v. *Continental Can Co.,* 196 Va. 935, 86 S.E.2d 128 (1955); *Werth* v. *Fire Companies' Adjustment Bureau, Inc.,* 160 Va. 845, 171 S.E. 255, *cert. denied,* 290 U.S. 659 (1933); *Wiseman* v. *Dennis,* 156 Va. 431, 157 S.E. 716 (1931); *Norfolk Motor Exchange, Inc.* v. *Grubb,* 152 Va. 471, 147 S.E. 214 (1929); see also, Comment, *A Fix At the Local Drug Store—Blue Cross Runs Afoul of the Sherman Act,* 57 Va. L.Rev. 315, n.2 (1971). Indeed, Section 59.1-9.17

(1974) expressly provides that "[t]his chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions."

In addition, a group boycott was illegal under common law. As stated in the chapter on "Antitrust and the Common Law" in a leading text:

> "A refusal to deal with a particular individual, however, is illegal if it is done in concert with others with a view toward injuring him." 1 J. Von Kalinowski, Antitrust Laws and Trade Regulation §1.03[4], at 1-58 (1976).

To this effect see, *e.g., Locker* v. *American Tobacco Co.,* 195 N.Y. 565, 88 N.E. 289 (1909); *Grillo* v. *Board of Realtors,* 91 N.J. Super. 635, 219 A.2d 635 (1966).

Finally, an *unlawful* threat was the keystone of Azalea's defense in the state court suit. No party at any stage of the proceedings in the state court action argued that the threat, if made, was lawful. To the contrary, Azalea's counsel urged, both in the lower state court and on appeal from the judgment, that the alleged threat violated Virginia law. It is thus wholly unreasonable to conclude that it was within the contemplation of the state trial judge that the alleged threat was lawful. As Judge Learned Hand said in a similar situation:

> "The doctrine of res judicata rests upon the importance of ending controversies once and for all, and allows for no exceptions based upon imported ingenuities of which the judges were unconscious * * *." *Irving National Bank* v. *Law,* 10 F.2d 721, 724-25 (2d Cir. 1926)

(2) The second alternative interpretation of the state court judgment is that the alleged threat might not have had coercive effect. However, as the Court of Appeals observed:

> "the factual dispute in the federal court was exactly the same as the factual dispute in the state court. * * * The testimony for the defense was that no such threat was made. *No one suggested that a threat was made but that it was made and understood to have been in jest or for some other reason did not restrict the exhibitor in the free exercise of his will.* When the state trial judge stated that he found the facts in the plaintiffs' favor, he must have found that no threat had been made" (4a-5a) (emphasis supplied).

Moreover, unless the threat had coercive effect, there could have been no antitrust violation, nor could there have been any resultant injury to petitioners, since the requisite causal connection between the threat and any damages would be lacking. "Coercion is the essence of antitrust * * *" 1 R. Callman, Unfair Competition, Trademarks and Monopolies §15.3(c)(5), at 362-63 (3d ed. 1967). And damage to business or property "by reason of" an antitrust violation is a *sine qua non* in any private antitrust suit. Clayton Act §4, 15 U.S.C. §15; *Brunswick Corporation* v. *Pueblo Bowl-O-Mat,* —— U.S. —— (Jan. 25, 1977); *Miller Motors* v. *Ford Motor Co.,* 252 F.2d 441, 448 (4th Cir. 1958); see, *South Carolina Council of Milk Producers, Inc.* v. *Newton,* 360 F.2d 414 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966).*

* Contrary to the argument advanced in the dissenting opinion (8a), in the federal action Azalea was required to prove that the alleged threat overcame the will of its officials, to the same extent as it

(footnote continued on next page)

Thus, whatever the ground for the state court's finding —that the alleged threat was not made or that it did not result in coercion—the judgment there is completely dispositive of Azalea's case here. When a judgment is given on alternative grounds, and either alternative would preclude recovery in the subsequent action, collateral estoppel properly applies. Restatement of Judgments §68, comment n (1942); 1B J. Moore, Federal Practice ¶0.443[5], at 3921-22 (1961); Note, 39 Va. L.Rev. 556, 568 (1953); *Irving National Bank* v. *Law,* 10 F.2d 721 (2d Cir. 1926); *Holmgren* v. *Westport Towboat Co.,* 260 Ore. 445, 490 P.2d 739 (1971); *Kelley* v. *Curtiss,* 16 N.J. 262, 108 A.2d 431 (1954); *Patterson* v. *Saunders,* 194 Va. 607, 74 S.E.2d 204 (1953).

II

All "vital policy considerations" compel, rather than preclude, the application of collateral estoppel.

As set forth above, the policy underlying collateral estoppel is itself of great importance (*supra,* p. 9) and collateral estoppel, based on judgments in actions of a commercial nature in federal or state courts, has been uniformly applied in antitrust suits (*supra,* p. 7).

was required in the state action. *Automatic Radio Manufacturing Co.* v. *Hazeltine Research,* 176 F.2d 799, 804-05 (1st Cir. 1949), *aff'd,* 399 U.S. 827 (1950); *Jack Winter, Inc.* v. *Koratron Co.,* 329 F.Supp. 211, 213 (N.D. Cal. 1971). As the trial court below correctly ruled: "We thus reject the plaintiffs' contention that the doctrine [of collateral estoppel] is inapplicable because the standard of duress in a federal antitrust action is somehow different from the standard applied in a state action. Our review of the cases establishes that elements necessary to prove duress are the same in federal and state courts" (17 a, n.10).

Lyons v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2d Cir. 1955), cited in the petition (p. 14), is actually in accord. Judge Learned Hand there stated that an estoppel applies to a "finding of one of the constituent facts that together make up a claim," as distinguished from "the entire congeries of such facts taken as a unit" (222 F.2d at 188). In the instant case, respondents have invoked collateral estoppel only with regard to one "constituent fact," namely, alleged coercion in obtaining the note. None of the other issues in the "entire congeries" of the antitrust claim is involved: neither the alleged conspiracy among the defendants, nor Kornfeld's authority to make the threat, nor the amount of damage.

Indeed, in *Becher* v. *Contoure Laboratories, Inc.*, 279 U.S. 388 (1929), cited and followed by Judge Hand in *Lyons*, this Court expressly rejected the argument of petitioners herein that a state court judgment cannot effect a collateral estoppel in a subsequent action over which the federal courts have exclusive jurisdiction. Mr. Justice Holmes there said:

> "That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that, if it is true, an important patent is void; and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. A party may go into a suit estopped as to a vital fact by a covenant. We see no sufficient reason for denying that he may be equally estopped by a judgment." *Id.* at 391-92.

III

Respondents never took any "inconsistent position."

Petitioners' contention of inconsistency on the part of respondents is not only irrelevant but is false in fact and erroneous in law.

Respondents, in opposing Azalea's motions to enjoin the pending state court action pursuant to 28 U.S.C. §2283, merely argued that this restrictive statute did not furnish a basis for the granting of the preliminary injunction sought. The district court, in denying injunctive relief, cited a few of the many pertinent authorities which demonstrate the fallacy of petitioners' present argument (24a-25a).

For example, in *Reines Distributors, Inc.* v. *Admiral Corporation*, 182 F.Supp. 226 (S.D.N.Y. 1960)—which, as the court observed, "is right on point with this case" (25a)—the antitrust defendants had also brought suit against the plaintiff in a state court on promissory notes. The plaintiff there also contended that the notes had been obtained in violation of the antitrust laws and, therefore, moved to restrain the defendants from prosecuting the state court action, and the defendants, as here, opposed that application. The injunction was denied, even though it was evident that some of the same issues would necessarily be raised in the state court.

Obviously, respondents never represented that facts which might be determined adversely to Azalea in the

state court would not be the subject of collateral estoppel in the instant action. Indeed, they could not then have known what the evidence in the federal court trial, held eight months later, would show.

The only "inconsistent position" taken is that of the petitioners who, in the state court, insisted that the duress they alleged was unlawful under Virginia law and now contend otherwise.

IV

The decision that petitioners are barred by collateral estoppel does not deprive them of their right to trial by jury in the instant action.

Petitioners speciously argue that, since there was no jury in the state court action, the application of collateral estoppel in the instant jury action deprives them of their constitutional right to a jury trial. To accept this argument would emasculate the entire doctrine of collateral estoppel, by rendering it inapplicable whenever the first action was tried without a jury and the second is triable with one.* The argument is also contrary to the decisions.

A similar contention, that the application of collateral estoppel by a judgment in a non-jury action deprived a

* Petitioners' reference to the striking of the antitrust defense in the state court action is completely irrelevant since the same factual issues were tried under another legal rubric. Moreover, as this Court has clearly held, such a defense may not be asserted in an action on a promissory note which "constitute[s] an intelligible economic transaction in itself." *Kelly* v. *Kosuga*, 358 U.S. 516, 521 (1959). Indeed, petitioners urged the striking of this defense as a ground for certiorari from the Virginia Supreme Court's decision, and that petition was denied. *Azalea Drive-In Theatre, Incorporated* v. *Sargoy*, 423 U.S. 940 (1975).

party of its constitutional right to a jury trial in the subsequent action, was squarely rejected in *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973). The Court of Appeals there held that a judgment in an action in equity must be given collateral estoppel effect in a subsequent action at law, despite the right to a jury trial in the latter, and that such collateral estoppel does not deprive a party of his Seventh Amendment right to a jury trial. Chief Judge Friendly commented:

> "This point as to the true bearing of *Beacon* and *Dairy Queen* is forcefully made in an able note by Professor David L. Shapiro and Daniel R. Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on *Rachal* v. *Hill*, 85 Harv. L. Rev. 442, 445-48. The authors continue with a further discussion, id. at 448-55, which is highly pertinent here. The framers of the Seventh Amendment sought to preserve the right to a jury trial in civil cases as it had existed 'at common law'. The authors cite abundant eighteenth century precedent, on both sides of the Atlantic, that a decree in equity was recognized as having preclusive effect in a subsequent action at law between the same parties. With the merger of law and equity effected by the Federal Rules of Civil Procedure, *a judgment in a suit which had been properly brought and tried as a suit in equity must govern all future proceedings between parties to which collateral estoppel would normally apply.*" *Id.* at 343 (emphasis supplied).

In full accord is Section 68 of the Restatement of Judgments (1942), relating to collateral estoppel:

> "j. Action at law and suit in equity. The rules stated in this Section are applicable to suits in equity as well as to actions at law. Where in a proceeding in equity a question of fact is actually litigated and deter-

mined by a valid and final decree, the determination is conclusive between the parties in a subsequent proceeding either at law or in equity on a different cause of action.

Illustration:

4. On the same day A and B make two contracts, by one of which B agrees to sell Blackacre to A and by the other he agrees to sell a horse to A. A brings a suit in equity for the specific performance of the first contract. B alleges that he was an infant when the agreement was made. Verdict and judgment for B. Thereafter A brings an action at law against B for damages for breach of the contract to sell him the horse. The judgment in the prior suit is conclusive that the defendant was an infant when the contract was made."

The fact is, the courts have uniformly assumed that the judgment in a non-jury case is entitled to collateral estoppel effect in subsequent jury cases. Thus, in *Granader* v. *Public Bank,* 417 F.2d 75 (6th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970), the court applied collateral estoppel in an antitrust action even though the prior judgment had been rendered in a state court action for the appointment of a receiver after a trial by a judge alone. Similarly, in *Vernitron Corp.* v. *Benjamin,* 440 F.2d 105 (2d Cir.), *cert. denied,* 402 U.S. 987 (1971), the court gave collateral estoppel effect in a federal antitrust action to a prior state court summary judgment.

Further, the collateral estoppel or *res judicata* effect of a determination by an administrative agency has been held to extend to a subsequent court action between the same parties, even though there was a right to jury trial in the latter. *Ellingson Timber Co.* v. *Great Northern Ry. Co.,*

424 F.2d 497 (9th Cir.), *cert. denied,* 400 U.S. 957 (1970); *Painters Dist. Council No. 38, etc.* v. *Edgewood Contracting Co.,* 416 F.2d 1081 (5th Cir. 1969); see, *United States* v. *Utah Construction and Mining Co.,* 384 U.S. 394, 421 (1966). Since there can never be a jury in administrative proceedings, the rule that they are entitled to collateral estoppel effect necessarily assumes that such effect cannot be a violation of the right to a jury trial in the subsequent action.

V

The "enforcement of the antitrust laws" will be in no way impaired by the denial of certiorari in this contrived, paper-thin action.

It is evident from the opinion of the Court of Appeals that the court was in no degree influenced by a prejudice against "the private antitrust action" (p. 23). (It is equally evident that petitioners' expression of concern for "lightening the court's burden" [p. 22] is unworthy of credit.)

While the court chose to decide the appeal on the independently sufficient ground of collateral estoppel—the first ground advanced in defendants' brief—it could as easily have reversed on any of four other grounds. These other grounds, particularly in combination, establish the spurious nature of the "antitrust case" presented by Azalea.

The truth is, Azalea failed to make out a *prima facie* case as to any of the four essential components of this

action based on an alleged conspiracy to boycott: (1) the existence of the *conspiracy;* (2) the *authority* of the auditor who allegedly made the threat; (3) the *coerciveness* of the alleged threat, and (4) *damage* resulting from the antitrust violation. The trial judge erred as a matter of law in permitting any of these issues to go to the jury.

Conclusion

The petition for a writ of certiorari should be denied.

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